CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 416.

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THE DELAWARE AND HUDSON COMPANY

vs.

THE ALBANY AND SUSQUEHANNA RAILROAD COMPANY ET AL.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED MAY 25, 1908.

(21,199.)

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1 *Certification of Question to Supreme Court.*

United States Circuit Court of Appeals, Second Circuit.

Before Lacombe, Ward and Noyes, Circuit Judges.

AETNA INSURANCE COMPANY and Twelve Others, Complainants-Appellees,

vs.

THE ALBANY & SUSQUEHANNA RAILROAD COMPANY, Defendant-Appellee, and THE DELAWARE AND HUDSON COMPANY, Defendant-Appellant.

This cause comes here upon appeal from a final decree of the Circuit Court Southern District of New York which directs that the defendant Delaware and Hudson Company (hereinafter called the Delaware Co.) pay to the defendant the Albany and Susquehanna Railroad Company, (hereinafter called the Susquehanna Co.) the amount of $1,107,923.24.

The case was fully argued and submitted on briefs. It thereupon developed that there was a question presented whether the bill could be maintained under the 94th Equity Rule. That question is a preliminary one, it has been held to be jurisdictional in character (City of Chicago *vs.* Mills, 204 U. S., 321; Doctor *vs.* Harrington, 196 U. S., 579) and this court desires the instruction of the Supreme Court for its proper decision.

2 *Statement of Facts.*

The facts upon which the question arises are as follows:

The defendant corporations are both citizens of the State of New York; the complainants are citizens of the States of Connecticut and Rhode Island. The bill was brought to obtain an accounting for various sums of money, which it was alleged became due at intervals during a series of years from the Delaware Company to the Susquehanna Company as rental or in the nature of rental under a lease made in 1870. For the convenience of all a copy of the pleadings is hereto annexed marked Exhibit "A" which may be referred to for a more detailed statement of the cause of action. The bill does not "set forth with particularity the efforts of the plaintiffs to secure such action as they desire on the part of the managing directors or trustees." Nor did the proofs show any such efforts. Nor does the bill set forth any efforts to secure "such action on the part of the shareholders." Nor did the proofs show any such efforts. Nor did the bill set forth, or the proofs show, "the causes of their failure to obtain such action" otherwise than is hereinafter disclosed.

The complaint was filed on June 12, 1906. The Susquehanna Company was organized under the Act of April 2, 1850, which

provides that "there shall be a board of thirteen directors * * * to manage its affairs" and for many years before this suit was brought a majority of the Board of Directors of the Susquehanna Company consisted of persons who were officers, directors or employees of the Delaware Company. At the time this suit was instituted, the directors and officers of the Susquehanna Com-
3 pany, the dates of their election as such, and their relations to the Delaware Company with dates of election were as shown on the following statement:

Names of directors of Susquehanna Company and dates of election as directors and officers.	Position in Delaware and Hudson Company and dates.
Robert M. Olyphant, 1878	Director since 1872 President from 1884 to 1903 Chairman of the Board since 1903.
George I. Wilber, 1883	Director since 1901
David Willcox, 1894 (Vice President, May 9, 1906)	General Counsel 1894 to 1903 Director since 1899 President since 1903
R. Suydam Grant, 1901	Director since 1886
Charles A. Peabody, 1902	Director since 1902
William S. Opdyke, 1903	General Counsel since 1903 Director since 1905.
Abel I. Culver, 1903	A Vice President since 1903.
Charles A. Walker, 1892	Treasurer 1892
Robert Olyphant, 1887 (President since 1889)	Son of Robert M. Olyphant
William L. M. Phelps, 1873 (Secretary since 1870)	Secretary of the Albany and Susquehanna Company, elected by the Board of Directors.
Robert C. Pruyn, 1890	Nominees of the Delaware Company as stated in the Delaware Company's answer.
James H. Manning, 1890	

Of these Robert M. Olyphant, R. Suydam Grant, Charles A. Peabody, William S. Opdyke, Abel I. Culver and Robert C. Pruyn at the time this suit was begun did not own or hold in their own right any shares of stock in the Susquehanna Company, but shares
4 of stock of that company owned by the Delaware Company were transferred to each of them on the books of the Susquehanna Company by the Delaware Company for the purpose of qualifying them as such directors. Charles A. Walker owned five shares of Susquehanna stock from 1901 to 1906; it does not appear that he owned any stock in the Susquehanna Company during the year 1906.

So far as appears from anything shown in this record none of the directors or officers of the Delaware Company ever, before or after the bringing of this suit, treated the claim therein set forth otherwise than as one of doubtful validity the payment of which was to be resisted.

On June 12, 1906, and for thirty years prior thereto, the capital stock of the Susquehanna Company had been fixed at and limited to 35,000 shares. Of this capital stock on June 12th, 1906, the Delaware Company owned 4500 shares and its directors or officers owned or controlled 4340 shares; the complainants owned 1312 shares and a so-called Protective Committee who from and after December 1905, had been opposing the administration of the Delaware Company upon the questions involved in this bill controlled 6688 shares. The entire 35,000 shares were held by 546 different persons, of whom 423 owned 50 shares or less, and of whom 383 resided in the State of New York.

An annual meeting of the Susquehanna Co. was held subsequent to the beginning of this suit, on October 16, 1906. At that meeting the nominees of the Protective Committee were elected, receiving 15,501 ballots, the nominees of the former management receiving 15,441 ballots. About two weeks before such annual meeting the Susquehanna Company being then controlled by the directorate above named, filed a demurrer to the bill which is hereto
5 annexed as Exhibit "B". Copies of such demurrer were sent by stockholders opposed to the existing control to all stockholders and thereafter and before the meeting proxies for several thousand shares were received by the persons who voted for the nominees then elected.

Questions Certified.

Upon the facts above set forth the questions of law concerning which this court desires the instruction of the Supreme Court are:

First. "Does the fact that before institution of this suit complainants made no demand for relief upon the Board of Directors of the Susquehanna Company prevent them from maintaining this bill?"

Second. "Does the fact that before institution of this suit complainants made no effort to obtain relief at a stockholders' meeting prevent them from maintaining this bill?"

In accordance with the provisions of Sec. 6 of the Act of March 31, 1891, the foregoing questions of law are, by the Circuit Court of Appeals for the Second Circuit, hereby certified to the Supreme Court.

E. HENRY LACOMBE,
H. G. WARD,
WALTER C. NOYES,
Circuit Judges.

6 United States Circuit Court of Appeals for the Second Circuit.

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit,

Do Hereby Certify that the foregoing certificate was filed and entered of record in my office on the 22nd day of May, 1908, and

by direction of the Judges of said Court, said certificate is forwarded to the Supreme Court of the United States.

Dated New York May 23, 1908.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

7 EXHIBIT "A."

Bill of Complaint.

Circuit Court of the United States, Southern District of New York.
In Chancery.

AETNA INSURANCE COMPANY ET AL., Complainants,
against
ALBANY & SUSQUEHANNA RAILROAD COMPANY and DELAWARE & HUDSON COMPANY, Defendants.

To the Judges of said Circuit Court, in Chancery Sitting:

Your orators, Aetna Insurance Company; Connecticut Trust & Safe Deposit Company, trustee as hereinafter stated, and Security Company, trustee as hereinafter stated each of said complainants being a corporation organized and existing under and by virtue of the laws of the State of Connecticut, and having its principal office in the City of Hartford, in said State of Connecticut; Atwood Collins, executor under the last will and testament of Erastus Collins, deceased; Francis R. Cooley, Charles P. Cooley and Melancthon W. Jacobus, executors under the last will and testament of Francis B. Cooley, deceased; Jonathan B. Bunce, Drayton Hillyer and Archibald A. Welch, trustees as hereinafter stated; John R. Redfield, trustee as hereinafter stated; Atwood Collins and John R. Redfield, trustees as hereinafter stated; John D. Browne, Lucius A.
8 Barbour and Francis Parsons, trustees as hereinafter stated; Mary Danesi and Fanny M. Barclay, each and every one of said complainants being a citizen of the State of Connecticut and residents of the City of Hartford in said State;

Rhode Island Hospital Trust Company, a corporation organized and existing under and by virtue of the laws of the state of Rhode Island and having its principal office in the city of Providence in said state, trustee as hereinafter stated; Howard O. Sturges, William L. Hodgman and Herbert J. Wells, trustees under the Will of Benjamin B. Knight, deceased, Mr. Sturges and Mr. Hodgman being residents of the town of Warwick in the State of Rhode Island and Mr. Wells being a resident of the town of South Kingston in the state of Rhode Island, each and every one of said complainants being a citizen of the state of Rhode Island, bring this their bill of complaint on behalf of themselves and of all other stockholders in the Albany & Susquehanna Railroad Company and of all other

creditors of the Delaware & Hudson Company similarly situated who may join herein and contribute to the expense of this proceeding against the Delaware & Hudson Company (hereinafter called the Delaware Company) a corporation organized and existing under the laws of the state of New York and having its principal office in the city of New York, in the Southern District of said state, and the Albany & Susquehanna Railroad Company (hereinafter called the Susquehanna Company), a corporation organized and existing under the laws of the state of New York, and both of said defendant corporations being citizens of said state of New York.

And thereupon your orators complain and say—that the above named complainant Ætna Insurance Company owns and continuously for over thirty-four years last past has owned five hundred shares of the capital stock of the defendant Susquehanna Company; that the above named complainant Connecticut Trust & Safe Deposit company owns and continuously for over sixteen years last
9 past has owned twenty-one shares in said defendant Susquehanna Company as trustee for Charlotte G. Beckwith Cook, formerly known as Charlotte G. Beckwith; and also that it owns and continuously for over eleven years last past has owned forty shares of stock in said Susquehanna Company as trustee for Richard L. Beckwith; and also that it owns and continuously for over sixteen years last past has owned twenty-one shares of stock in said Susquehanna Company as trustee under the last will and testament of Horatio Alden, deceased; that the above named complainant Security Company owns and continuously for more than fourteen years last past has owned eighty shares of stock in said defendant Susquehanna Company as trustee under the last Will and Testament of Joseph Trumbull; that said Security Company further owns and continuously for more than seventeen years last past has owned fifty shares of stock in said defendant Susquehanna Company as trustee under the last Will and Testament of John A. Taintor, deceased; that the above named complainant Atwood Collins, as executor of the last will and testament of Erastus Collins, deceased, owns one hundred shares of stock in said defendant Susquehanna Company, and that the said shares have been the property of the said decedent and of the said Atwood Collins as his executor continuously for more than twenty years last past; that the above named Francis R. Cooley, Charles P. Cooley and Melancthon W. Jacobus, as executors of the last Will and Testament of Francis B. Cooley, deceased, own one hundred shares of stock in said defendant Susquehanna Company, and that the said shares have been the property of the said decedent and of his said executors continuously for over eighteen years last past; that the above named Jonathan B. Bunce, Drayton Hillyer and Archibald A. Welch own and continuously for more than thirty-three years last past have owned one hundred shares of stock in said defendant Susquehanna Company, as trustees under the last Will and Testament of Ira Peck, deceased; that the above mentioned complainant John R. Redfield owns and continuously for
10 more than thirty years last past has owned twenty-five shares of stock in said defendant Susquehanna Company as trus-

tee under the last will and testament of George S. Howe; that said John R. Redfield further owns and continuously for more than thirty years last past has owned twenty-five shares of stock in said defendant Susquehanna Company as trustee under the last Will and Testament of E. G. Howe, deceased; that the above named Atwood Collins and John R. Redfield, surviving trustees under the Will of E. H. Perkins, deceased, own forty-one shares of stock in said defendant Susquehanna Company, and that the said shares have been the property of the said decedent and of the said trustees under his last Will and Testament continuously for more than twenty-five years last past; that the said John D. Browne, Lucius A. Barbour and Francis Parsons, as trustees under the last Will and Testament of Calvin Day, deceased, own five shares of stock in said defendant Susquehanna Company, and that the said shares have been the property of the said decedent and of the trustees under his Will continuously for more than fourteen years last past; that the above named complainant Mary Danesi owns and continuously for more than five years last past has owned fifty shares of stock in said defendant Susquehanna Company; that the above named complainant Fanny M. Barclay owns and continuously for more than ten years past has owned six shares of stock in said defendant Susquehanna Company; that the above named complainant Rhode Island Hospital Trust Company as trustee under the last Will and Testament of William L. Beckwith, deceased, owns seventy-four shares of stock in said defendant Susquehanna Company, and that the said shares have been the property of the said decedent and of the trustee under his said Will continuously for more than eighteen years last past; that the above named complainants Howard O. Sturges, William L. Hodgman and Herbert J. Wells, as trustees under the last Will and testament of Benjamin B. Knight, deceased, own seventy-four shares of stock in said defendant Susquehanna Company, and that the said shares have been the property of the said decedent and of the trustees under the said Will continuously for six years last past.

11

And your orators show to the court that the defendant Delaware Company has endorsed and guaranteed to each of your orators certain payments upon the shares of stock so held by them respectively as hereinafter and in the lease and agreement hereto attached is stated.

That the defendant Susquehanna Railroad Company was organized in or about the year 1851 under and pursuant to the Act of the Legislature of the State of New York entitled "An Act to authorize the formation of Railroad Corporations and to regulate the same" passed April 2, 1850 the purpose for which the said corporation was formed being to construct, maintain and operate a railroad for public use from a point on the line of the New York and Erie Rail Road at or near to the Village of Binghamton, in the County of Broome, to the City of Albany, in the State of New York, through the Valley of the Susquehanna; that the term of said corporation was by the articles of association fixed at one hundred and fifty years; that the capital stock of said defendant was by its charter

fixed at $1,400,000 with the right to increase the said stock pursuant to the provisions of the Act before referred to, and that the authorized amount of capital stock was increased and by the Act of the Legislature of said State of New York passed April 16, 1859, fixed at the sum of $4,000,000, but that as hereinafter stated part only of the capital stock so authorized has been issued.

That the said defendant after its organization entered upon the construction of its railroad between the points mentioned, and that the said railroad was thereafter completed, equipped and operated by said Albany & Susquehanna Rail Road Company; that to raise money for the purposes aforesaid the defendant Railroad Company from time to time made its several mortgages, as follows:

12 On or about the 1st day of July, 1863, the said Susquehanna Company made its mortgage securing bonds to the principal amount of $1,000,000, payable twenty-five years after date and bearing interest at the rate of 7% per annum.

On the 10th day of April, 1852, the Legislature of the State of New York authorized the City of Albany to issue bonds to the amount of $1,000,000 and to loan the same to the Albany & Susquehanna Rail Road Company; said bonds to bear interest at 6% per annum, payable semi-annually, and the principal to be payable at the expiration of thirty years from the date of issue, the Susquehanna Company to pay the interest thereon at the rate aforesaid; also to pay 1% a year to the Trustees of the Sinking Fund of the City of Albany and all premiums which might be received from the sale of said bonds, the payments so made to constitute a sinking fund for the ultimate payment of the bonds of the City of Albany so issued and loaned, and the obligations of the Company in reference to said bonds to be secured by a mortgage to the Mayor, Aldermen and Commonalty of the City of Albany.

That on or about the first day of November, 1865, said Susquehanna Company made, executed and delivered its mortgage as in said act provided, and to the said mortgage and to the provisions thereof and its agreements for payment to the Trustees of said Sinking Fund, your orators expressly refer; that the bonds which the City of Albany was authorized to issue were in fact issued and delivered to the said Susquehanna Company, and that in accordance with the provisions of said Act and of the mortgage given thereunder, and of the mortgage dated July 1, 1863, the lien of both mortgages was equal, and that both mortgages together were commonly described as said defendant's first mortgage.

That on or about the 1st day of October, 1865, the said Susquehanna Company issued its mortgage known as its second mortgage securing bonds to the amount of $2,000,000 bearing interest at the rate of 7% per annum and on May 1, 1869, issued its third

13 mortgage securing bonds to the amount of $500,000 bearing interest at the rate aforesaid: and that on the first day of February, 1870, the mortgages of the defendant company secured bonds issued or to be issued to the amount of $4,500,000 as above stated, and that the capital stock of said defendant lawfully issued and at that time legally outstanding amounted to about $2,500,000.

That the defendant, Delaware Company, then known by the corporate name of the President, Managers and Company of the Delaware & Hudson Canal Company, being desirous of leasing the railroad and railroad property of the defendant Susquehanna Company on or about the twenty-fourth day of February, 1870, made and entered into a written agreement with the Susquehanna Company wherein and whereby the Susquehanna Company leased to said Delaware Company for and during the full end and term of the said lessor's charter and every renewal and continuance thereof, its railroad and railroad property and the said Delaware Company agreed to pay therefor a certain rent which until the first day of January, 1871, should be paid at the rate therein fixed and which on and after the first day of January, 1871, was in said lease fixed at the yearly sum of $490,000; that the Susquehanna Company in said lease was designated as the party of the first part, the Delaware Company was designated as the party of the second part, and that in and by the said lease it was agreed that the rental should be payable in the way and manner and at the times which in said lease were stated in the words and figures as follows:

"And the said party of the second part, in consideration of the demise, covenants and agreements herein contained, and to be performed, fulfilled and kept on the part of the party of the first part, its successors and assigns, hereby covenants and agrees that it will pay as and for the annual rent aforesaid semi-annually, the interest accruing and to become due and payable from and after the
14 date of these presents, upon one million of dollars at six per cent. Albany city bonds, issued to the party of the first part under and by virtue of an Act of the Legislature of this State, entitled 'An Act to authorize the City of Albany to make a loan to the Albany & Susquehanna Railroad Company,' passed April 10, 1852, together with one per cent. thereon to the sinking fund, as mentioned and referred to in the aforesaid Act, and will also pay, semi-annually, three and one-half per cent. for the interest accruing from and to become due and payable after the date of these presents, upon three and a half millions of dollars of certain mortgage bonds made and executed by the party of the first part, upon the aforesaid railroad property and effects, according to the terms and conditions thereof, and will also pay to the party of the first part, in equal monthly installments, from the date of these presents until the first day of January, one thousand eight hundred and seventy-one, at the rate of one hundred and forty thousand dollars per annum, and will also, from and after the first day of January, one thousand eight hundred and seventy-one, upon the first days of July and January in each year, pay a semi-annual dividend of three and one-half per cent. upon the then existing shares of the capital stock of the said party of the first part, not exceeding twenty-five thousand shares, and if so many shares do not exist at the time of any such payment, or if the sum required for the payments before mentioned, shall not amount to the aforesaid four hundred and ninety thousand dollars, the balance not applied to the payment of such interest and dividends shall be paid to the said party of the

first part. It being understood, however, that the interest and dividends to be paid as aforesaid shall and may be paid directly to the respective bond and stockholders."

Your orators further show that in and by said lease it was
15 further covenanted that in case the second party should at any time thereafter desire to enlarge the capacity of the railroad by building a double track, extending the length thereof or otherwise, then, and in every such case, the party of the first part should as therein provided issue additional stock or bonds, the amount thereof to be so limited that the liabilities of the Susquehanna Company in stock and bonds should never exceed $15,000,000 and the lessee to pay to the holders of all such additional bonds or stock so issued interest or dividends thereon at the rate of 7% per annum in equal semi-annual payments.

Your orators therefor- show to the Court that the lessee in and by said lease agreed to pay for the demised property as it then stood, annual rental as follows:

Interest on $3,500,000 mortgage Bonds	$245,000.
Dividends on stock (not exceeding $2,500,000 par value)	175,000.
Interest on Albany loan at 6%	60,000.
Sinking Fund for Albany loan 1% annually	10,000.
	$490,000.

And further for all additions and enlargements which might be made to said property the lessee assumed to pay in addition to its rent above stated interest or dividends at the rate of seven per cent. upon the amount of all new securities which under the provisions of the lease should be issued therefor by the Susquehanna Company, for additions or enlargements.

And your orators show that the covenant in said lease contained to the effect that the said lessee should pay directly to the stockholders of the said Susquehanna Company, a portion of the rent accruing under said lease, was made for the benefit of said stockholders; that the said Delaware & Hudson Company in and by said lease agreed to endorse upon the certificates belonging to stockholders in said Susquehanna Company its guaranty of such payments according to the terms under its corporate seal; that the defendant
16 Delaware Company did in fact so guarantee such payments to stockholders and as your orators are informed and believe said defendant Delaware Company has since that time made its payments directly to stockholders.

And your orators show that said lessee further covenanted that if the sum required for the payment of the minimum rental of $490,000 should not amount to said sum the balance not applied to the payment of interest and dividends should be paid to the Susquehanna Company and that your orators are advised that upon a proper construction of said lease the provisions thereof forbid sums paid as interest or dividends upon securities issued for additions and enlargements should be credited upon said minimum rental of $490,000, but were by said lease to be paid in addition thereto.

Your orators further show, that, as hereinafter will more fully and at large appear, the defendant Delaware Company has failed to pay the said minimum rental of $490,000 in that

1. The mortgage bonds bearing seven per cent. interest were retired at some time unknown to your orators but as your orators are informed and believe prior to the year 1885 by bonds bearing six per cent., and that thereafter the said Delaware Company should have paid the amount which it was so relieved of paying as interest upon said bonds directly to the Susquehanna Company, for its stockholders;

2. That said six per cent. bonds were in the month of April 1906 retired by the issue of bonds bearing 3½ per cent. and that thereafter the Delaware Company should pay to the Susquehanna Company for its stockholders the further amount which it is relieved from paying as interest upon Susquehanna bonds.

3. That the defendant Delaware Company upon payment of said Albany loan failed to pay the amount designated for the service thereof during its existence as in said lease provided, but retained the same to its use.

17 Your orators show that the defendant Delaware Company insists that it has the right to credit all sums paid under said lease upon said minimum rental, but your orators show that in and by said lease a distinction was made with regard to interest on then existing bonds and bonds thereafter to be issued, the lessee agreeing as to then existing bonds to pay as interest the annual sum of $245,000 or if so much were not required to pay the balance to the Susquehanna Company; while as to bonds thereafter to be issued it was covenanted only that the lessee should pay the interest upon such limited amount as the lessor upon its demand should issue.

And your orators further show that the said lease further provided with respect to the two classes of securities therein contemplated, viz: those then existing, and those thereafter to be issued under the covenants relating to additions and enlargements, that the securities existing at the time the lease was made should be entitled to preference in case of foreclosure, the provision for such preference being as follows:

"It is further mutually covenanted and agreed that in case of foreclosure and sale of either of the aforesaid class of bonds now existing, or which may hereafter be created, then the seven millions of dollars of stocks and bonds named in this instrument shall be first fully paid and discharged, from and out of the proceeds of sale, and the balance of such proceeds shall be applied to the payment of the remaining bonds in the order of their priority."

And your orators show to the Court, that in order to give effect to this provision, the lessee was thereby obligated in case of the issue at any time thereafter of stock or bonds for additions or enlargements upon said demised property expressly to provide in creating such stock or bonds that security therefor should rest

18 upon such additions and enlargements and that holders thereof could not look for satisfaction to the property mentioned in the lease, but to such surplus only as might exist after sale of said property and after satisfaction of the preferred securities.

Your orators allege that upon the execution and delivery of said indenture of lease the Defendant Delaware Company entered into and upon the railroad of the defendant Susquehanna Company making improvements and enlarging the capacity thereof and securing possession of large amounts of the capital stock of said company; that question arose whether the shares of capital stock of the Susquehanna Company so acquired by the Delaware Company were properly authorized and issued; that it was to the interest of the Susquehanna Company that under the provisions relating to the enlargement of its property bonds should be issued rather than stock, also to restrict the amount of bonds which could so be issued; that it was to the interest of the Delaware Company to procure in place of the stock certificates which it then held new securities of unquestioned validity and also to procure the rescission of that provision of the lease giving to securities therein mentioned a preference over those thereafter to be issued, and that for all these purposes and to adjust the differences which had arisen between said parties in reference to the issue of additional securities beyond those in existence when the lease was made a supplemental contract was on or about the seventh day of March, 1876, made and entered into between the said Delaware Company and the said Susquehanna Company, the said supplemental contract reciting the original lease, and your orators attach hereto a copy of said supplemental contract, marking the same "Exhibit A" and expressly refer thereto and to the original lease therein recited and make the same a part hereof as though inserted at this place. For convenience of reference your orators have in said exhibit separately entitled the original lease and the provisions of the supplemental agreement, have numbered the
19 paragraphs of the original lease and added marginal subtitles, all additions to the text being printed in red ink.

Your orators show that in and by the said supplemental contract the questions which were at issue between the parties were compromised, the Delaware Company surrendering to the Susquehanna Company certificates for 15,950 shares of stock in said Susquehanna Company, and the Susquehanna Company upon its part agreeing that the total amount of its capital stock be fixed at and limited to the sum of $3,500,000; that in respect to said capital stock the distinction contained in the lease between the two classes of securities therein provided for should be abrogated and made of none-effect; that all of said stock should share equally in such savings of interest as might thereafter be effected, and to this end, after the one million dollars of the Albany City Bonds issued to the Susquehanna Company should be paid by the operation of the sinking fund, the sum of seventy thousand dollars a year, being part of the original rental of $490,000 should not be applied for the exclusive benefit of the stock amounting at par to $2,500,000 contemplated by the original lease, but should be applied to the total amount of the capital stock as fixed and limited by the supplemental contract, thus making the dividends upon 35,000 shares of stock under the conditions then existing 9% per annum; that the said covenants were intended for the equal benefit of all holders of the increased capital stock of the said defendant Susquehanna Company; that the Delaware Company

in and by the said supplemental contract agreed upon demand to endorse upon each certificate of stock in the Susquehanna Company its guaranty of payment of all sums which should become due to stockholders in said Susquehanna Company under the provisions of said lease and of said supplemental contract and to execute the said guaranty under its corporate seal; that the defendant Delaware Company did in fact guaranty all such payments to your orators and has made directly to your orators and the other stock-
20 holders in said Susquehanna Company its payments accruing under said lease and supplemental contract, save as the said Delaware Company is in default thereon, as hereinafter stated.

Your orators therefore show to the court that the lessee, in and by said supplemental contract agreed to pay for the demised property a total minimum annual rental as follows:

Minimum rental fixed by original lease	$490,000.
Additional dividends to be paid on additional $1,000,000 of stock	70,000.
Total	$560,000.

That in and by said supplemental contract the said lessee agreed to pay as rental for the demised property said sums of $560,000 and in addition thereto interest upon all bonds which should be issued as in said contract provided.

That by said contract in order to provide for the payment of the then outstanding mortgage bonds and to pay the said Delaware Company for the cancelling and surrender of the aforesaid 15,950 shares of stock, and for other purposes as stated therein, it was agreed that the defendant Susquehanna Company should make, execute and deliver its mortgage to the Farmers' Loan & Trust Company of the City of New York to secure bonds of the par value of $10,000,000; that the said mortgage was in fact made, executed and delivered, the said bonds were issued and that in accordance with the provisions of the said contract and of the mortgage made in pursuance thereof, part of the said bonds drew interest at 7%, and part at 6%; that in said agreement it was provided that the bonds of the Susquehanna Company issued by said company under mortgages which were in existence at the date of said lease, amounting to the total sum of about $3,500,000 should be retired by bonds issued under the mortgage to the Farmers' Loan & Trust Company, bearing 6% interest, and that said bonds were thereafter in fact so retired, and replaced by bonds drawing a lower rate of interest as aforesaid.

21 Your orators show that the said mortgage to the Farmers' Loan & Trust Company is by said Supplemental Agreement expressly designated and entitled a "First Consolidated Mortgage" and secured equally bonds of both classes described in the original lease; that in and by said lease it was expressly covenanted and agreed that in case the bonds then existing should be renewed or retired by another issue of bonds, such new bonds should be for the same amount as the bonds so retired, or sufficient by their net proceeds to provide for the payment of the bonds so retired, and that

neither party to said lease could upon the retirement of the then existing bonds, issue in place thereof bonds in excess of the limit thus fixed; that the class of bonds described in said original lease as the then existing bonds being the bonds of the Susquehanna Company to the amount of about $3,500,000 upon which it was agreed that the interest paid by the Delaware Company be credited as part of its minimum annual payment of $490,000 rent reserved by the original lease, and the second class of bonds described in said original lease being bonds to the amount of about $6,500,000 issued for the additions and enlargements upon which it was agreed that the Delaware Company should pay interest in addition to the annual rent of $490,000 reserved by the original lease, together constitute the issue of $10,000,000 secured by the mortgage to the Farmers' Loan & Trust Company.

Your orators further show that in the year 1906 the bonds secured by the mortgage to the Farmers' Loan & Trust Company were paid and retired by a new issue of bonds for the same principal sum bearing interest at three and one-half per centum per annum, that the (*mortgage*) said last named issue is now in existence and that the bonds now outstanding represent and include both classes of bonds mentioned in the lease and supplemental agreement hereinbefore described.

Your orators further show to the court, that the defendants herein give out and insist that the provisions for the payment of rent
22 in the original lease contained were rescinded by the supplemental agreement and replaced by the provisions thereof whereby the defendant, Delaware Company, guaranteed dividends at the rate of nine per cent. (9%) upon the stock of the Susquehanna Company.

And your orators show, that said guarantee does not in fact restrict the obligations of said defendant, but, as hereinafter stated, varies the terms of the guarantee undertaken by it in the original lease; that by said lease the defendant, Delaware Company, guaranteed to pay dividends at the rate of seven per cent. (7%) upon stock in the Susquehanna Company not exceeding at par value the amount of two and one-half million dollars ($2,500,000) and agreed to pay the surplus rent to the Susquehanna Company; that in and by the said supplemental agreement the defendant, Delaware Company, guaranteed, upon payment of the Albany loan, to pay the amount which it should thereby be relieved from paying as interest upon said loan directly to stockholders of the Susquehanna Company, making dividends thereon at the rate of nine per cent. (9%) upon an increased amount of stock; but that the provision in the original lease, that the surplus of rent should be paid to the Susquehanna Company was not rescinded or modified, and that it was in and by the said supplemental agreement expressly stipulated that all and singular the covenants, agreements and provisions, in the original lease, except as modified in the supplemental agreement, should be and remain in full force, the same to all intents and purposes as though the said supplemental agreement had not been made.

And your orators therefore show, that the assertion that the pro-

visions in the original lease for payment of rent are wholly superseded by the supplemental agreement is without foundation; that notwithstanding this fact, the assertion has been widely made by the Delaware Company and has been supported by misleading statements as to the contents of the contracts between the Delaware Company and the Susquehanna Company; that on the 18th day of December, 1905, the Delaware Company caused to be published a state-
23 ment, whereof a copy is hereto attached and marked "Exhibit B"; and your orators are informed and believe and so charge that officers and directors of the Susquehanna Company, acting in collusion with and for the benefit of the said Delaware Company, knew and approved of the said publication.

That as your orators are informed and believe for the purpose of protecting the defendant, Delaware Company, upon its obligation in the premises and to enable it largely to participate in the benefit of all payments made under said lease to the Susquehanna Company, the defendant, Delaware Company, and the directors of the Susquehanna Company herein named, devised a plan for the issue of a large amount of additional stock in the Susquehanna Company and the delivery of the same to the Delaware Company, as hereinafter stated.

Prior to the maturity of the bonds secured by the mortgage to the Farmers' Loan & Trust Company, and on or about the 15th day of March, 1905, the Board of Directors of the Albany and Susquehanna Railroad Company called a special meeting of the stockholders of the said Company, to be held on the 7th day of April, 1905, for the purpose of considering and acting upon a proposition, in accordance with the request of the Delaware and Hudson Company, to make a mortgage upon the property of the Susquehanna Company to secure an issue of $10,000,000 three and one-half per cent. forty-year bonds, principal and interest thereof to be guaranteed by the Delaware and Hudson Comapny and to be delivered to the Delaware and Hudson Company for the redemption of the $10,000,000 first consolidated mortgage bonds of the Susquehanna Company maturing April 1, 1906; and of agreeing with the Delaware and Hudson Company that whenever that Company should surrender to the Susquehanna Company any of the said new three and one-half per cent. bonds, the Susquehanna Company should issue to the Delaware and Hudson Company in lieu thereof an equal amount of the four per cent. preferred stock of the Susquehanna Company; and of author-
24 izing an increase of the Susquehanna Company's capital stock in the amount of $10,000,000, consisting of 100,000 shares of $100 each, preferred both as to principal and dividends, to be issued at par in retiring the said new three and one-half per cent. bonds upon the surrender of the same by the Delaware and Hudson Company, or if the Delaware and Hudson Company should so request, to issue the said new stock at par in the first instance in lieu of the said new bonds provided that the aggregate amount of the stock and bonds of the Company outstanding at any time should not exceed the amount of $13,500,000 at par; that the said call for said special meeting was by order of the Board of Directors of the Susquehanna

Company and signed by Robert Olyphant, as President, and W. L. M. Phelps as Secretary, and that accompanying said call was a circular issued by the Board of Directors of the Susquehanna Company setting forth the objects of the said special meeting and urging upon the stockholders of the Susquehanna Company the adoption of the proposed plan, stating that their situation would be greatly improved thereby and that the offer of the Delaware and Hudson Company was in every aspect a favorable one for the Susquehanna Company and its stockholders; that accompanying said call and circular was a proxy in accordance with the said plan, appointing Robert Olyphant, James H. Manning, George I. Wilber, Robert C. Pruyn and William L. M. Phelps, attorneys to vote the stock at the said special meeting, and the stockholders were urged in said circular to sign and return said proxies.

And your orators attach hereto copies of the said notice, also of the said circular and also of the said form of proxy, making the same a part hereof, as though inserted at this place and marking the same "Exhibits C," "D," and "E," respectively.

And your orators show, that the said notice, circular and form of proxy were issued by the directors and officers of the Susquehanna Company, acting in collusion with the defendant, Delaware
25 Company, and for the interest of the said Delaware Company; that the statements in the said notice and circular incorrectly stated the contracts between the defendant companies; that in and by the original lease it was provided that when the bonds, interest upon which is to be paid by the lessee, arrive at maturity, if the same be not changed by the holders thereof for new bonds and payment of principal be demanded and be not paid by the lessor, then the lessor in order to protect the property leased from foreclosure and sale should if so required by the lessee issue in due form new bonds, payable at such time and in such manner as the lessee should require, or shall, at the option of the lessee, issue stock therefor, and should deliver the said bonds or stock to the lessee to be negotiated and sold, the net proceeds arising therefrom to be applied to the payment of such maturing bonds and that the new bonds or stock should be sufficient in amount to provide by their net proceeds for the payment of such maturing bonds; and the payment of the interest or dividends upon such new bonds or stock should be guaranteed in the same manner as the interest upon such maturing bonds.

Your orators further show, that the provisions in the original lease for the retirement of bonds at maturity by the issue of stock, was expressly rescinded and set aside by the provision in the supplemental agreement that the total amount of the capital stock of the Susquehanna Company should be fixed at and limited to the sum of three million, five hundred thousand dollars ($3,500,000); that certificates representing stock in excess of said sum in possession of the Delaware Company should be surrendered and that in place thereof bonds should be issued.

Your orators show, that in and by the said circular and notice issued to stockholders of the Susquehanna Company as aforesaid, reference was made to the provisions of the original lease but the fact that these provisions had been rescinded was suppressed and no

reference was made to the provisions of the supplemental
26 agreement bearing thereon; that the said notice and circular were thereby made misleading and that by means thereof many stockholders in the Susquehanna Company were induced to sign the proxies which were requested, authorizing the persons therein named to vote for an increase of stock in the Susquehanna Company; that said provisions, so submitted to the stockholders of the Susquehanna Company, were urged upon said stockholders by the directors of the Susquehanna Company acting in collusion with and at the instance of the defendant, Delaware Company, and for its benefit; and your orators are advised that said propositions were not only in violation of the terms of the supplemental agreement as aforesaid, but were also in violation of the original lease and of your orators' rights in the effort to give to the Delaware Company and to no other stockholder in the Susquehanna Company a continuing option to exchange bonds for stock; also in that it was sought to make stock so to be issued a preferred stock; also in that it was sought to issue said stock to the Delaware Company at par, although its market value would be much greater; and also in that by making the proposed issue bear four per cent. dividends instead of seven per cent. dividends as contemplated in the original lease, was sought to give to the Delaware Company upon its purchase of the proposed stock a large number of votes for a comparatively small outlay of capital; that the defendant Delaware Company, and the officers and directors of the defendant, Susquehanna Company, were aware at the time the said notice, circular and forms of proxies were issued that the proposed proceeding was in violation of the contracts between the defendant, Susquehanna Company, and the said Delaware Company and of the rights of stockholders in the Susquehanna Company and that upon complaint by any dissenting stockholder, the contemplated proceedings would be enjoined.

Your orators further show, that a small minority of the stockholders in the Susquehanna Company did in fact object to the issue of additional Susquehanna stock and presented their objection
27 at the office of the Delaware and Hudson Company in New York to the President of said Company, and that by reason of objections so made by stockholders, the Delaware Company and the directors of the Susquehanna Company abandoned the effort to secure an increase of stock in the Susquehanna Company as aforesaid.

Your orators further show that in and by the said lease and supplement thereto the entire and exclusive management and control of all the railroad and property of the lessor was given over to the lessee; that the lessee agreed to keep the same in repair and operation and itself to perform all and every duty and obligation toward the public imposed upon the lessor by its charter; that by said contracts it was agreed that the corporate organization of the lessor should thereafter be maintained, but that the same was to be done at the expense of the lessee for its benefit and that said lessee was given the right at any time and in all places to use the corporate name of the Susquehanna Company in any suits or proceedings wherein it shall be necessary or proper for the enforcement of its rights against third

parties and your orators allege that by the provisions of said lease and agreement the Susquehanna Company substantially ceased to exist save as a continuing source of title for said lessee and for the protection of its interests; that all its active functions were assumed by and have since been performed by the lessee, and that said lessee in and by the said lease and supplemental agreement assumed direct relations with the bondholders and stockholders in the Susquehanna Company making said bondholders and stockholders its creditors.

Your orators further show that the Act of the Legislature of the State of New York passed April 10, 1852, authorizing the City of Albany to make a loan to the Albany & Susquehanna Railroad Company provided that the Susquehanna Company should pay to the Trustees of the sinking fund of the City of Albany all premiums
28 received upon the sale of bonds issued under the provisions of said Act and should also pay to said Trustee annually 1% on the entire loan by said Act authorized; that the said Act further required that no portion of bonds therein authorized be issued or loaned to the Company until certain requirements should have been carried into effect, among others, the execution of a mortgage by the Susquehanna Company to the Mayor, Aldermen and Commonalty to secure principal and interest of the bonds of the City by said Act authorized and payments to the sinking fund as therein required, and further that upon compliance with all the conditions of said act and the approval of the mortgage by the Common Council, then the Mayor of the City should execute and deliver the bonds as authorized by said act; that in accordance with said provisions the Susquehanna Company did on or about the first day of November, 1865, execute its mortgage to secure the bonds loaned by the City of Albany and that in and by said mortgage after providing for the payment of principal and interest of said bonds and after providing for other payments to the Trustees of the sinking fund of the City of Albany, it was further provided that in case the Railroad, with the consent of the mortgagee, should sell any lands or real estate which were not requisite for use of the Road the proceeds thereof should be received by the Trustees of the sinking fund of the City of Albany and be invested and held by them as a fund toward the payment and redemption of said bonds or be applied by them directly to that purpose. And your orators are informed and believe and charge that the amounts so due and payable by said lessees to said sinking fund if made would have been sufficient to have paid said Albany City bonds before the year 1902, and that thereafter the amount which the lessee was relieved from paying for interest and sinking fund on said bonds should have been paid as in said lease and supplemental agreement provided, making dividends at the rate of nine per cent. on stock in said Susquehanna
29 Company; that the defendants insist that the said loan was paid in the year 1902 and not before, that your orators were entitled to receive dividends at the rate of nine per cent. upon their said stock on the first day of January, 1903, and not before. And your orators show that the said defendant Delaware

Company has paid dividends at said rate upon and since the first day of January, 1903, and that prior to said date the said defendant paid dividends on said stock at the rate of seven per cent. and no more; that no account of the amounts and investments of said sinking fund has been made to your orators; that the accounts showing payments made by the defendants to the trustees of the sinking fund of the City of Albany and the investments of money so paid are in the possession of the defendant corporations; that in or about the year 1881 the City Hall in the City of Albany, wherein said accounts were kept, was destroyed by fire; that the accounts and records of said trustees were then destroyed; that since said year the said Trustees have kept no complete accounts and that your orators are informed and believe that the only existing records and accounts of the said sinking fund payments and investments are those kept by and in the possession of the defendant companies.

Your orators further show that the said accounts are extremely complicated, involving numerous payments made at different times by the defendant corporations; the investments thereof made by the trustees and the receipts and disbursements made on account of said investments; that your orators are entitled to a full and complete account thereof under the orders of this honorable court; that upon taking of such an account a date should be fixed by the decree of this court when as between your orators and said defendant the said loan should be considered paid by the operation of said sinking fund; that from and after said date the defendant Delaware Company should be ordered and decreed to pay to your orators in accordance with the terms of their guarantee as stated in said supplemental contract the amount so owing to your orators upon said guarantee, and your orators are informed and believe and allege that upon such account being taken the said defendant will be found indebted to your orators in a sum largely exceeding two thousand dollars.

Your orators further show that upon the retirement of bonds secured by the earlier mortgages above mentioned by later bonds bearing a lower rate of interest, the said lessee was bound under the provisions of said lease to pay to the Susquehanna Company the amount which it was then relieved from paying as interest, upon said bonds, but your orators show that the defendant Delaware Company has failed and neglected so to do, but it has kept and retained to its own use all saving of interest so made.

That your orators are informed and believe and so allege that said bonds bearing seven per cent. interest were retired as aforesaid by the issue of bonds bearing six per cent. interest prior to the year 1880; that upon such retirement the said Delaware Company became obligated under the provisions of said lease annually to pay to said Susquehanna Company for its stockholders the difference between six per cent. and seven per cent. interest upon said bonds, being the sum of thirty-five thousand dollars a year, and that the amount thereof should have been added to the semi-annual dividends paid upon the stock of the Susquehanna Company, and that

if so added would have increased the amount of each half yearly dividend one-half of one per cent. upon the par value of said stock; that there is now due and owing from the said Delaware Company to said Susquehanna Company the principal amount of all such arrears, together with interest thereon from the date and dates when the same became due, and your orators believe and allege that the principal amount so due from the Delaware Company to the Susquehanna Company exceeds the sum of eight hundred and seventy-five thousand dollars; that the said sum of money so owing to the Susquehanna Company should be paid to the stockholders in said company as a dividend upon their stock and that there is
31 now due and owing to the holders of stock in the said Susquehanna Company from the defendant Delaware Company the amount of one dollar upon each share of stock in the Susquehanna Company for each year since the retirement of said bonds as above stated to the present time with interest thereon, and that the principal amount of such arrears so due to your orators largely exceeds the sum or value of $2,000.

That the defendant companies should account to and with each other and with your orators, and should show the time and times when the seven per cent. bonds were retired as aforesaid; should show the time and times when the bonds were issued under the mortgage to the Farmers' Loan & Trust Company, the amount of payment of rent made under the provisions of said lease, and the said Delaware Company should pay to the said Susquehanna Company for your orators, or to your orators, to be credited upon the rental due to the Susquehanna Company as the court may direct, all unpaid rental, together with lawful interest thereon from the day when the same became due.

Your orators further show that in and by the said lease it was provided that during the term thereof the legal organization of the Susquehanna Company should be kept and continued at the expense of the Delaware Company, not exceeding, however, the annual sum of $1,000, and that the Susquehanna Company would when thereunto reasonably requested by the Delaware Company do and perform at the expense of said Delaware Company all such reasonable acts, matters and things as may be proper for the protection, preservation and enjoyment of the demised property and to carry said lease into effect; that under said provision the said Delaware Company has since the making of such lease maintained the corporate organization of said Susquehanna Company and for such purpose with the notice of the annual meeting of the Susquehanna Company has each year sent to stockholders of the Susquehanna Company a request for proxies to vote upon said stock. That stockholders in the defendant Susquehanna Company are very
32 numerous and that about four-fifths in number of said stockholders own fifty shares of stock in said company or less; that upon all of said stock the Delaware Company has guaranteed payments of the dividends as before stated; that the officers and directors of the defendant Delaware Company have represented to the stockholders of the Susquehanna Company that the interests of

the two companies were not in conflict; that the Delaware Company has fully performed all its obligations toward the Susquehanna Company and toward its stockholders, and that by means of such representations the Delaware Company has procured from the stockholders in the Susquehanna Company authority to vote upon their stock at the annual meeting of said company; that during the period of thirty years last past the directors elected by the use of proxies obtained as aforesaid have been nominees of the Delaware Company; that during all of said period and at the present time the directors of the Susquehanna Company have been and are entirely dominated by the Delaware Company; that at the present time and for more than two years last past, the Board of Directors of the Susquehanna Company has been composed of the following named twelve persons: Robert M. Olyphant, George I. Wilber, David Willcox, R. Suydam Grant, Charles A. Peabody, William S. Opdyke, Abel I. Culver, Charles A. Walker, William L. M. Phelps, Robert C. Pruyn, James H. Manning and Robert Olyphant; that the above named Robert M. Olyphant, is Chairman of the Board of Directors of the Delaware Company and appears upon the stockbooks of the Susquehanna Company to own five shares of stock in said Company and no more; that David Willcox is President of the Delaware Company; that the first five persons above named—Olyphant, Wilber, Willcox, Grant and Peabody are directors of the Delaware Company and that said Grant and Peabody appear on the stock books of the Susquehanna Company to own five shares and one share of stock in said Company and no more; that William S. Opdyke is general counsel
33 of the Delaware Company and appears upon the stock books of the Susquehanna Company as the owner of one share of stock in said company and no more; that Abel I. Culver is second Vice-President of said Delaware Company and appears upon the stock books of the Susquehanna Company to own one share of stock in said Company and no more; that Charles A. Walker is treasurer of the Delaware Company and appears upon the stock books of the Susquehanna Company to own five shares of stock in said company and no more.

And your orators are informed and believe and so allege that the said directors and officers of the Delaware Company above named are largely interested in said Delaware Company and in fact control said defendant Company and its Board of Directors; that they are under a duty to the said Delaware Company and to the stockholders thereof to represent that company and to protect its interest as against your orators, and as against the Susquehanna Company.

Your orators further show that William L. M. Phelps, the secretary of the Susquehanna Company, and a member of its board of directors, is so employed by the Delaware Company and that he is by said company continued in said position; that Robert Olyphant appears upon the stock books of the Susquehanna Company to own one share of stock in said company and no more; that your orators are informed and believe that the said Robert Olyphant is engaged, as an agent or representative of the Delaware Company in the business of dealing in coal which is mined and transported by it and

that his said business is dependent upon the said Delaware Company; that said Olyphant is largely interested in the Delaware Company, and is represented upon the Board of Directors thereof by Robert M. Olyphant above mentioned; that your orators are informed and believe and so charge that James H. Manning and Robert C. Pruyn are both largely interested with the Delaware & Hudson Company having intimate business relations therewith, and that Robert C. Pruyn appears upon the stock books of the Susquehanna Company to own one share of stock in said company and no more; and your orators charge that the interest of said Robert M. Olyphant, R. Suydam Grant, Charles A. Peabody, William S. Opdyke, Abel I. Culver, Charles A. Walker, William L. M. Phelps, Robert C. Pruyn and Robert Olyphant, in said Susquehanna Company is a nominal interest only; that the stock standing in the names of said directors is so placed for the purpose of qualifying said persons to act as directors of said Susquehanna Company and that in fact said persons have been elected directors of said Susquehanna Company by the votes of the Delaware Company and of persons interested therein, and upon the Board of Directors of the Susquehanna Company represent the interest of said Delaware Company in opposition to the interests of the Susquehanna Company.

Your orators further charge that the above named directors have long occupied the position of directors of the said Susquehanna Company and have long been interested in the defendant Delaware Company; that they and each of them have long known that the said Delaware Company was indebted upon the said lease and supplemental agreement as hereinbefore stated, but that they have conspired with the said Delaware Company to deprive the Susquehanna Company and its stockholders of the income to which they are entitled as aforesaid, for the benefit of said Delaware Company; that at the present time, as appears from the stock books of the defendant Susquehanna Company the defendant Delaware Company owns about 4500 shares of stock in said Susquehanna Company; that in addition thereto the directors of the Delaware Company individually own or represent over 5,000 shares of stock in the Susquehanna Company; and at the present time your orators are informed and believe and so charge that the Delaware Company controls a majority of stock in the Susquehanna Company and votes, or procures the same to be voted in opposition to the interest of the said Albany and Susquehanna Rail Road Company; your orators further allege that the said board of directors of the Susquehanna Company is composed of the same persons who have wrongfully deprived your orators and the Susquehanna Company of the sums due to them and to it under the provisions of said lease and supplemental contract, and who have failed and refused to sue therefor and to collect the same; that the said board is dominated by, and is acting in collusion with the defendant Delaware Company for the purposes aforesaid, and that no demand for action in the premises has been made of the directors of the Susquehanna Company for the reason that such demand, under the facts and circumstances above set forth

would be idle and nugatory, and that this suit is not a collusive one to confer jurisdiction upon the Circuit Court of the United States in respect to a matter of which it would not otherwise have cognizance.

Your orators show that the interests of the Susquehanna Company, and of its stockholders are in fact different from the interests of the Delaware Company in the matters hereinbefore stated; that it is the duty of the Susquehanna Company to protect the interests of its stockholders, to collect the sums owing to it from the Delaware Company and to distribute the same among its stockholders.

Forasmuch therefore as your orators are without remedy in the premises save in a court of equity where such matters are cognizable, and to the end that the said defendants full, true and perfect answer make, but not under oath, answer under oath being hereby expressly waived, your orators pray that an account may be taken under the direction of this honorable court.

Of all sums paid by the defendants to the trustees of the sinking fund of the City of Albany and of the dates of such payments, of the investments thereof receipts therefrom, and of all payments and expenses charged against said fund; and that for the purpose
35 aforesaid the defendants may be required to make full discovery of the accounts and records in their possession relating thereto; that a date may be fixed by decree of this court when as between your orators and said Delaware Company the said Albany loan shall be regarded as paid by the operation of said sinking fund and that for the period elapsed thereafter the defendant Delaware Company shall be directed to pay to your orators the balance of indebtedness upon their said guaranty.

That an account may be taken of the sums due from the said Delaware Company to the Susquehanna Company as rent according to the terms of said lease and supplemental contract; that the said Delaware Company may be required to pay all sums which upon such accounting shall be found owing by it and of all sums which shall be owing at the date of decree herein, and that said sums be paid to said Susquehanna Company for the benefit of its stockholders and by said Company to be paid to them; or, that the proportion thereof belonging to your orators and all other persons similarly situated who may join herein be determined by decree of this court and be paid to them, with interest from the time when the same became due; that the defendants may be enjoined and restrained from making any settlement of the matters in controversy or from entering into any reference or arbitration of them without leave of this honorable court, and that for the purposes aforesaid a temporary restraining order may issue; that from all sums so awarded may be paid your orators' outlay in the premises, including fees of attorneys and counsel, and that your orators may have such other and further relief as the nature of the case may require and to your honors may seem meet.

May it please your honors to grant unto your orators the writ of subpœna in chancery, commanding the defendants to be and appear on a certain day and under a certain pain to be therein specified, before this Honorable Court, there to stand to, abide by and

37 perform all that your honors may deem meet in the premises, and your orators will ever pray, etc.

AETNA INSURANCE COMPANY,
CONNECTICUT TRUST AND SAFE DEPOSIT COMPANY, *Trustee,*
SECURITY COMPANY, *Trustee,*
ATWOOD COLLINS, *Executor,*
FRANCIS R. COOLEY,
CHARLES P. COOLEY, AND
MELANCTHON W. JACOBUS,
Executors,
JONATHAN B. BUNCE,
DRAYTON HILLYER, AND
ARCHIBALD A. WELCH,
Trustees,
JOHN R. REDFIELD, *Trustee,*
ATWOOD COLLINS AND
JOHN R. REDFIELD,
Trustees,
JOHN D. BROWNE,
LUCIUS A. BARBOUR, AND
FRANCIS PARSONS,
Trustees,
MARY DANESI,
FANNY M. BARCLAY,
RHODE ISLAND HOSPITAL TRUST COMPANY, *Trustee,*
HOWARD O. STURGES,
WILLIAM L. HODGMAN, AND
HERBERT J. WELLS,
Trustees,
By HOWLAND, MURRAY & PRENTICE,
EDWARD W. SHELDON,
Their Solicitors.

ADRIAN H. JOLINE,
GEORGE WELWOOD MURRAY,
EDWARD W. SHELDON,
E. PARMALEE PRENTICE,
CHARLES P. HOWLAND,
Of Counsel.

38 Circuit Court of the United States, Southern District of New York.

AETNA INSURANCE COMPANY ET AL., Complainants,
against
ALBANY & SUSQUEHANNA RAILROAD COMPANY and DELAWARE & HUDSON COMPANY, Defendants.

STATE OF CONNECTICUT,
County of Hartford, ss:

Wm. Z. Clark, being first duly sworn on oath, says that he is the President of Aetna Insurance Company, one of the above entitled complainants, and as such duly authorized to make this affidavit for and on behalf of said corporation; that he has read the foregoing bill and knows the contents thereof, and that the matter and things therein stated are true, save such as are therein stated to be alleged or charged upon information and belief and as to such matters he believes them to be true.

WM. Z. CLARK.

Subscribed and sworn to before me this 7th day of June, 1906.
[SEAL.] FREDERICK H. HUBBARD,
Notary Public in and for the City and County of Hartford and State of Connecticut.

39 Circuit Court of the United States, Southern District of New York.

AETNA INSURANCE COMPANY ET AL., Complainants,
against
ALBANY & SUSQUEHANNA RAILROAD COMPANY and DELAWARE & HUDSON COMPANY, Defendants.

STATE OF CONNECTICUT,
County of Hartford, ss:

Arthur P. Day, being first duly sworn on oath, says that he is the Secretary of Connecticut Trust and Safe Deposit Company, one of the above entitled complainants, and as such duly authorized to make this affidavit for and on behalf of said corporation; that he has read the foregoing bill and knows the contents thereof, and that the matters and things therein stated are true, save such as are therein stated to be alleged or charged upon information and belief and as to such matters he believes them to be true.

ARTHUR P. DAY.

Subscribed and sworn to before me this 7th day of June, 1906.
[SEAL.] J. LINCOLN FENN,
Notary Public in and for the City and County of Hartford and State of Connecticut.

40 Circuit Court of the United States, Southern District of New York.

AETNA INSURANCE COMPANY ET AL., Complainants,
against
ALBANY & SUSQUEHANNA RAILROAD COMPANY and DELAWARE & HUDSON COMPANY, Defendants.

STATE OF CONNECTICUT,
County of Hartford, ss:

Francis Parsons, being first duly sworn on oath, says that he is the Secretary of the Security Company, one of the above entitled complainants, and as such duly authorized to make this affidavit for and on behalf of said corporation; that he has read the foregoing bill and knows the contents thereof, and that the matters and things therein stated are true, save such as are therein stated to be alleged or charged upon information and belief and as to such matters he believes them to be true.

FRANCIS PARSONS.

Subscribed and sworn to before me this 7th day of June, 1906.
[SEAL.] PAUL E. PARMELEE,
Notary Public in and for the City and County of Hartford and State of Connecticut.

41 Circuit Court of the United States, Southern District of New York.

AETNA INSURANCE COMPANY, CHARLES P. COOLEY ET AL., Complainants,
against
ALBANY & SUSQUEHANNA RAILROAD COMPANY and DELAWARE & HUDSON COMPANY, Defendants.

STATE OF CONNECTICUT,
County of Hartford, ss:

Charles P. Cooley, being first duly sworn, on oath says: That he is one of the complainants in this the above entitled cause and makes this affidavit on his own behalf and on behalf of all other complainants; that he has read the foregoing bill and knows the contents thereof, and that the matters and things therein stated are true, save such as are therein stated to be alleged or charged upon information and belief and as to such he believes them to be true.

CHARLES P. COOLEY.

Subscribed and sworn to before me this 7th day of June, 1906.
[SEAL.] H. W. THOMPSON,
Notary Public, County of Hartford, State of Connecticut.

42 EXHIBIT A.

Whereas, The Albany and Susquehanna Railroad Company (hereinafter called the Railroad Company), and The President, Managers and Company of The Delaware and Hudson Canal Company, (hereinafter called the Canal Company) on the 24th of February, A. D. 1870, made, entered into, executed and delivered an Indenture of Lease, as follows, to wit:

*Original Lease.**

This Indenture, made and entered into this twenty-fourth day of February, one thousand eight hundred and seventy, by and between The Albany and Susquehanna Railroad Company of the first part, and The President, Managers and Company of The Delaware and Hudson Canal Company of the second part, *witnesseth:*

Lease of railroad.—1. That the party of the first part, in consideration of the rent, covenants and agreements hereinafter mentioned, reserved and contained on the part and behalf of the party of the second part, its successors and assigns, to be had, kept and performed, has granted, demised and leased, and by these presents does grant, demise and lease unto the said party of the second part, its successors and assigns, the entire railroad of the party of the first part, lying, being and extending from its eastern terminus in the city of Albany, in the State of New York, in a south-westerly direction, through portions of the counties of Albany, Schenectady, Schoharie, Otsego, Delaware, Chenango and Broome, to its western terminus in the City of Binghampton, being in length one hundred and forty-two miles or thereabouts; also all the lands, tenements, hereditaments, appurtenances, buildings, fixtures and machinery appurtenant and belonging to or connected with the said railroad, or in any manner used or employed by the party of the first part in operating said railroad; also all rails, ties, fencings and erections of every kind belonging to, upon, or connected with said railroad; also all the cars, locomotives, engines, tools, machinery, equipments and appliances belonging to or connected with said railroad, and the use thereof; also all and every right of way, license, easement, right, privilege and immunity of the party of the first part, conferred by, and possessed and enjoyed under and by virtue of, its charter, and of any and every act passed and to be passed amendatory thereof, and otherwise, howsoever obtained, with the full right and authority to have, hold and use such rights of way, easements, rights, privileges and immunities as fully as the party of the first part might or could if these presents had not been executed. To have and to hold all and singular the above demised

Equipment, etc.

43

Habendum.

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railroad, premises, property, estate and effects, including the right of way, easements, licenses, privileges and immunities aforesaid, unto the party of the second part, its successors and assigns, from the day of the date hereof, for and during the full end and term of the charter of the party of the first part, or of any and every renewal and continuance thereof, yielding and paying therefor unto the party of the first part, its successors or assigns, rent at the rate of four hundred and fifty-five thousand dollars per annum from the date of these presents until the first day of January, one thousand eight hundred and seventy-one, and thereafter the annual rent of four hundred and ninety thousand dollars, payable in the way and manner and at the times hereinafter particularly stated.

Rent accruing on and after Jan. 1st, 1871, fixed at $490,000 a year.

2. And the said party of the second part, in consideration of the demise, covenants and agreements herein contained, and to be performed, fulfilled and kept on the part of the party of the first part, its successors and assigns, hereby covenants and agrees that it will pay as and for the annual rent aforesaid, semi-annually, the interest accruing and to become due and payable from and after the date of these presents, upon one million of dollars of six per cent. Albany city bonds, issued to the party of the first part under and by virtue of an act of the Legislature of this State, entitled "An act to authorize the city of Albany to make a loan to the Albany and Susquehanna Railroad Company," passed April 10, 1852, together with one per cent. thereon to the sinking fund, as mentioned and referred to in the aforesaid act, and will also pay, semi-annually, three and one-half per cent. for the interest accruing from and to become due and payable after the date of these presents, upon three and a half millions of dollars of certain mortgage bonds made and executed by the party of the first part, upon the aforesaid railroad property and effects, according to the terms and conditions thereof, and will also pay to the party of the first part, in equal monthly installments, from the date of these presents until the first day of January, one thousand eight hundred and seventy-one, at the rate of one hundred and forty thousand dollars per annum, and will also, from and after the first day of January, one thousand eight hundred and seventy-one, upon the first days of July and January in each year, pay a semi-annual dividend of three and one-half per cent. upon the then existing shares of the capital stock of the said party of the first part, not exceeding twenty-five thousand shares, and if so many

Covenant of lessee to pay interest on Albany loan;

Also to pay into sinking fund for Albany loan.

Also to pay interest on $3,500,000 bonds;

Also to pay dividends on stock:

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shares do not exist at the time of any such payment, or if the sums required for the payments before mentioned, shall not amount to the aforesaid four hundred and ninety thousand dollars, the balance not applied to the payment of such interest and dividends shall be paid to the said party of the first part. It being understood, however, that the interest and dividends to be paid as aforesaid shall and may be paid directly to the respective bond and stockholders.

Also to pay balance to Susquehanna Company.

Covenant of lessee to repair.—3. And the said party of the second part further covenants and agrees in manner aforesaid that during the term hereby granted, it will, at its own cost, risk and expense, maintain, preserve and keep the aforesaid railroad in good working condition and repair, as a first-class railroad, and so as to be suitable for the transaction of all the business that can be reasonably done thereon, and will also maintain, preserve and keep the side tracks, station houses, fixtures, appurtenances, tools, machinery, rolling stock and equipments belonging and appertaining to the said railroad, in as good repair, order and condition as the same are in at the date of these presents, and will maintain and keep in order all fences, cattle guards and warning boards which are or shall be necessary or required by law, and will operate, employ and use the said railroad, its fixtures and appurtenances in such manner as to do and perform in a proper manner all the business offered to and which can be reasonably done upon the same, and will perform all and every duty and obligation toward the public which the party of the first part would be legally bound to do and perform under its aforesaid charter if these presents had not been executed.

Covenant of lessee to endorse its guarantee of interest and dividends.—4. And the party of the second part hereby further covenants and agrees, in manner aforesaid, that, upon the due presentation of the aforesaid Albany city bonds, mortgage bonds, and the scrip or certificates of the stock, the interest and dividends upon which are to be paid as aforesaid, it will, by a proper instrument in writing, to be endorsed or stamped thereon respectively, and duly executed, guarantee to the owner and holder thereof payment of the interest and dividends thereon, as aforesaid, the dividends to be payable semi-annually, on the first days of January and July, as aforesaid, and the interest to be payable according to the terms and conditions of the said bonds; and in case the party of the first part at any time shall desire to use new bonds, either in renewals of, or to obtain means with which to pay, bonds now outstanding, or any portion of them, that the party of the second part will endorse or stamp such new bonds, in the manner aforesaid, and deliver the same to the party of the first part; provided that the new bonds, so endorsed or stamped, shall be for the same amount as the bonds then surrendered to the party of the second part for cancellation. And in

Renewal of outstanding bonds by lessor.

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case the aforesaid bonds, or any of them, shall at any time be converted into stock, that thenceforth the party of the second part will pay, in lieu of the aforesaid interest on said bonds, semi-annual dividends on said stock, at the rate of three and a half per cent., and, upon due presentation of such new stock, will endorse or stamp upon the same a guarantee of the payment of such semi-annual dividends, according to this agreement; and in all cases of new certificates being issued on the return of guaranteed certificates, or transfer of guaranteed shares, or new bonds having been issued in place of guaranteed bonds, the said party of the second part shall endorse or stamp the like guarantee on such new certificates and bonds; provided, however, and it is hereby understood and agreed, that in case the party of the first part shall fail to keep and perform these presents upon its part, that thereupon such guarantee, and each and every of them, shall become and be null and void.

Covenant of lessee to pay taxes.—5. And the said party of the second part further covenants and agrees, in manner aforesaid, that, during the time of this demise, it will pay, bear and discharge all taxes and assessments of every description assessed, imposed, levied and accruing upon the railroad, property and effects hereby demised, and upon the business done upon the said railroad, from the day of the date hereof, in the same manner and to the same extent as the party of the first part would be liable to pay if these presents had not been executed. And if, by any change of the law, the present tax or duty required of the said party of the first part shall be required of the said stockholders, then the said party of the second party shall pay the same. But the party of the second part
46 shall not be required to pay the present income tax upon the aforesaid interest and dividends, or any tax thereon imposed, or hereafter to be imposed, by whatever name the same may be called. And if the law under which tax is or may be levied requires the party of the second part to pay the same, then the amount of tax so paid may be deducted and kept back from and out of the aforesaid interest and dividends. And, further, that the party of the second part will pay all expenses for construction, repairs, salaries, and otherwise, which may be necessarily incurred on account of the railroad and demised premises, from the day of the date hereof; and will also pay and discharge all damages which may be recovered against the said party of the first part, for injuries to persons or property, or for negligence, or breach of duty as carriers or warehousemen, and in all respects save the said party of the first part harmless and indemnified from all damages, losses and penalties which may be incurred *or* arise in or by the conduct, use or operation of said railroad.

To pay for repairs, etc.

Lessor's covenant for quiet possession.—6. And the said party of the first part, for itself, its successors and assigns, hereby covenants and agrees to and with the said party of the second part, its successors and assigns, that it has full power and lawful authority to execute these presents, and that the said party of the second part,

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its successors and assigns, paying the said yearly rent above reserved, and performing the covenants and agreements herein contained on its part, shall and may at all times, during the continuance of this lease, peaceably and quietly have, hold, possess and enjoy the railroad property, rights and effects hereby demised, and every part thereof, without any manner of let, suit, trouble or hindrance, of or from the party of the first part, its successors or assigns, or any other person or persons whomsoever, lawfully claiming or to claim the same.

Lessor's covenant for further assurance.—7. And the said party of the first part further covenants and agrees in manner aforesaid, that it shall and will from time to time, during the continuance of this lease, make, execute, and deliver to the party of the second part, its successors and assigns, all and every such further and other leases, deeds, transfers, instruments in writing and assurances as by said party of the second part, its successors or assigns, shall be reasonably desired or required for fully effectuating the objects, intents and purposes of this lease, and of leasing the railroad and other property hereinbefore mentioned, and hereby leased or intended
47 so to be, and for more fully confirming and securing unto the said party of the second part, its successors and assigns, all the rights and privileges hereinbefore mentioned, and granted and secured, or intended so to be.

Lessor's organization to be maintained at expense of lessee.—8. And the said party of the first part further covenants and agrees that it will, during of the term of this demise, keep and continue, at the cost and expense of the said party of the second part, not exceeding, however, the annual sum of one thousand dollars, its legal organization, and also at all times, when thereunto reasonably required by said party of the second part, do and perform, at the expense of the said party of the second part, all such reasonable acts, matters and things as may be proper for the due protection, preservation and enjoyment of the property hereby demised, and to carry into effect the true intent and meaning of this instrument, so far as the same may be done consistently with the rights of the said party of the first part, and in default thereof, the same may be done by, but at the expense of, the said party of the second part, and therein the said party of the second part may use the name, power and authority of said party of the first part; and further, that the said party of the second part may, at any time, and in all places, at its own expense, use the corporate name of the party of the first part in any suits or proceedings wherein it shall be necessary or proper for the enforcement of its rights against the third parties.

Assignment of certain contracts, etc.—9. And the said party of the first part hereby further covenants and agrees, in manner aforesaid, that it will and does hereby assign and transfer to the party of the second part, its successors and assigns, by a proper instrument in writing to be duly executed, all its right, title and interest of,

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to a certain contract made and executed by and between the
rty of the first part and the Cherry Valley and Mohawk River
ad Company, now known as the Cherry Valley, Sharon and
y Railroad Company, and also in and to a certain contract
with the Fall Creek Coal Company, in relation to operating
lroad belonging to the last aforesaid Railroad Company, and
rrying coal thereon for the said Company, and also the con-
or additional land at Albany, made with the Van Rensselaer
and also the contract for the erection of a joint depot at
amton, made with the Erie Railway Company and with the
se, Binghamton and New York Railroad Company; and also
all pending contracts for supplies, materials and equipments
not yet delivered, and which contracts, respectively, the party
of the second part agrees to perform, and carry out according
tenor and effect thereof, as fully as the party of the first part
be bound to do if these presents were not executed; and the
ty and interests resulting from said contracts and the per-
nce thereof shall be subject to this lease, and shall form a
f the demised property.

k and bond register to be kept.—10. It is hereby mutually
nted and agreed, by and between the parties hereto, that there
e kept, at the office of the party of the second part, a book
ster containing a record in proper form of the aforesaid stock,
each and every of the aforesaid bonds, and of the bonds
may be issued in substitution therefor, which register shall be
t all reasonable and proper times to the inspection of the party
first part, its successors or assigns.

And it is further mutually covenanted and agreed, that when
nds, the interest upon which is to be paid by the party of the
part, as above provided, arrive at maturity, if the same be
changed by the holders thereof for new bonds, and payment
of the principal be demanded and be not
ewals of out- paid by the party of the first part, then the
ng bonds by party of the first part in order to protect the
property hereby leased from foreclosure and
sale, shall, if so required by the party of the
part, issue in due form new bonds, payable at such times
such manner as the party of the second part shall require, or
t the option of the party of the second part, issue stock there-
d shall deliver the said bonds or stock to the party of the
part to be negotiated and sold, and the net proceeds arising
om shall be applied to the payment of such maturing bonds;
ew bonds or stock to be sufficient in amount to provide, by
et proceeds, for the payment of such maturing bonds, and the
nt of the interests or dividends upon such new bonds or stock
e guaranteed in the same manner as have been the interest
uch maturing bonds.

nent of stock subscriptions.—12. And it is further mutually
nted and agreed, that the said party of the first part will,
er requested by the said party of the second part, require

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the payment, in installments, of the balance of the nine thousand five hundred shares of stock which has been subscribed, and on which an installment of ten per centum has been paid, and will
49 pay over the said installments, when collected or received, to the said party of the second part, and the said party of the second part will apply the same to the laying of additional track, the purchase of additional equipment, and other necessary improvements of said road, and will also pay an additional rental, semi-annually, at the rate of seven per centum per annum on such installments, as may from time to time be paid as aforesaid; and said stock when fully paid shall have the like guarantee as is hereinbefore provided for the twenty-five thousand shares of full paid stock, issued and to be issued as aforesaid, to the extent of the ninety per cent. to so be received by the party of the second part as aforesaid.

Issue of additional stocks or bonds of lessor for additional facilities.—13. And it is hereby further mutually covenanted and agreed, that in case the party of the second part shall at any time hereafter desire to enlarge the capacity of the said railroad by building a double track, extending the length thereof, or otherwise, that then, and in every such case, the party of the first part, its successors or assigns, shall and will make, execute and deliver to the party of the second part its successors or assigns, additional stock or bonds, in such form, for such amount, and payable at such times, as the party of the second part may require, which stock and bonds shall be delivered to and negotiated by the party of the second part, and the proceeds and money realized therefrom shall be received by it, and be used and applied in building such double track, enlargements and improvements, and in equipping and stocking the same; and the party of the second part shall and will thereafter pay the holders of such bonds or stock an interest or dividend thereon at the rate of seven per cent. per annum, in equal semi-annual payments, as hereinbefore provided in respect of the present bonds and stock, and shall and will also endorse or stamp thereon a guarantee of the payment of such interest and dividend in the way and manner above provided; but the total amount of all such additional bonds shall never be such that the aggregate liabilities of the party of the first part, in stock and bonds, shall exceed fifteen millions of dollars. But other than this the party of the first part, its successors or assigns, shall not nor will make or issue any bonds or stock, for any purpose whatever, beyond what have been already issued and are now in existence, except as hereinbefore provided, without the consent in writing of the party of the second part, its successors or assigns.

Aggregate of stock and bonds not to exceed $15,000,000.

49½ Lessee may make improvements.—14. It is hereby further mutually covenanted and agreed, that the said party of the second part may, from time to time, at its own expense, make all such alterations, improvements and additions in, upon or to the property hereby demised, as may be proper for its full enjoyment for railroad purposes. And in case said party of the second part shall

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at any time desire, for its more advantageous use of said demised property, to acquire, obtain or enjoy any additional lands, rights of way or other property, said party of the first part, when thereto reasonably required and indemnified against all expense and damage therefrom, shall aid therein, with its name, power and authority and in default thereof, such name, power and authority may be used by said party of the second part, after fully indemnifying the said party of the first part as aforesaid, and all lands, rights of way or other property which shall be so acquired or obtained, shall immediately be and become part of the property covered by this demise.

Lessee to have exclusive control of leased property.—15. And it is hereby further mutually covenanted and agreed, that the party of the second part, its successors and assigns, shall at all times, during the continuance of this lease, have the exclusive right to manage and control the railroad and premises, and to regulate and determine the rates of passage money, tolls, freights and charges for all the transportation over the whole or any part of said railroad and premises, and shall also have full, free and exclusive right to charge and collect all the passage money, rents, tolls, freights and charges, and to appropriate the same to its use; and shall have, use, exercise and enjoy all the rights, powers and authority aforesaid, and all other corporate powers and privileges which can or may be lawfully exercised and enjoyed on or about said demised railroad and premises, as fully, amply and entirely as the same might or could have been used, exercised and enjoyed by the party of the first part if this instrument had not been made, and as exclusively, fully, amply and entirely as the party of the first — have or shall acquire authority by law to grant the same, subject, nevertheless, at all times to the restrictions and regulations imposed by law.

Default by lessee.—16. And it is hereby further mutually covenanted and agreed, that in case of default in payment of interest and dividends on the bonds, stock and the sinking fund aforesaid, and if the same or any part thereof shall remain unpaid for the
49¾ space of sixty days from and after the time when the same shall become due and payable, then the said party of the first part shall have the right to enter upon and take possession of all the property hereby leased, and all depots, shops, buildings, tracks and other permanent property or rolling stock added thereto, and that the party of the second part will not unlawfully hinder or prevent such entry, nor the taking possession and using of all the said property by the party of the first part for its own benefit and use, and that this lease shall terminate upon the party of the first part so taking possession of the demised premises. Provided, however, that in case the party of the second part shall be unavoidably restrained by injunction or by law (not obtained by or upon their own action) from paying the aforesaid rent and performing the covenants herein contained, or any of them, then and in that case, the time during which the party of the second part shall be so restrained shall not be taken or considered as any part of the aforesaid sixty days. And

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further, that this lease shall not be assigned by the party of the second part without the consent in writing of the party of the first part first had and obtained.

Preference in case of foreclosure.—17. It is further mutually covenanted and agreed, that in case of foreclosure and sale of either of the aforesaid class of bonds now existing, or which may hereafter be created, then the seven millions of dollars of stock and bonds named in this instrument shall be first fully paid and discharged, from and out of the proceeds of said sale, and the balance of such proceeds shall be applied to the payment of the remaining bonds, in the order of their priority.

Form of guarantee.—18. And it is hereby further mutually covenanted and agreed, that the guarantee to be endorsed on the aforesaid bonds and stock, shall be in the following form, merely changing the same so far as may be necessary to make the same applicable to the said stock, that is to say: The President, Managers, and Company of The Delaware and Hudson Canal Company hereby guarantee to the holder hereof the payment of the interest on this bond, according to the terms thereof, subject to the conditions and provisions of a certain lease, made between the said Canal Company and The Albany and Susquehanna Railroad Company, bearing date the twenty-fourth day of February, one thousand eight hundred and seventy, and duly recorded in Albany and other counties, such guarantee to be duly executed under the corporate seal of the party of the second part.

19. And it is further mutually covenanted and agreed, that all the provisions of this instrument, shall extend to, and bind the respective successors and assigns of the parties hereto, and wherever mention is hereinbefore made of either party hereto, the successors and assigns of such party shall be deemed to be comprehended.

In Witness Whereof each of the parties hereto has affixed his corporate seal and caused these presents to be duly countersigned by its proper officer, the day and year herein first above written.

[U. S. Int. Rev. Stamp. ($1,225.50) Cancelled.]

[L. S.] THE PRESIDENT, MANAGERS, AND COMPANY OF THE DELAWARE & HUDSON CANAL COMPANY,
THOMAS DICKSON, *President.*

Attest,
CHARLES P. HART, *Treasurer.*

[L. S.] THE ALBANY & SUSQUEHANNA RAILROAD COMPANY,
J. H. RAMSEY, *President.*

Attest,
W. L. M. PHELPS, *Secretary.*

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*Provisions of Supplemental Contract.**

And whereas questions have arisen as to the proper construction of some of the provisions of said Indenture, and as to the rights and liabilities of the said parties thereunder, and as to whether the certificates issued by the said Railroad Company to the said Canal Company, dated the 26th day of July, A. D. 1872, for fifteen thousand nine hundred and fifty shares of the capital stock of said Railroad Company, were properly authorized and issued, or now are valid certificates.

And whereas both of the parties to said Indenture desire to now have the said questions and the rights and liabilities of the said parties respectively under the said Indenture definitely settled.

Now, therefore, in consideration of the premises and of one dollar by each of the said parties to the other, in hand paid before
51 the execution hereof, the receipt whereof is hereby by the said parties respectively acknowledged, and of the mutual agreements herein contained, they

Do Hereby Agree.

Capital stock of lessor fixed at $3,500,000.—First. That the total amount of the capital stock of the said Railroad Company shall be, and the same is hereby fixed at and limited to the sum of three millions five hundred thousand dollars, to be represented by thirty-five thousand shares of stock, of one hundred dollars each, upon which the said Canal Company shall, upon the first days of January and July in each year, pay a semi-annual dividend of three and one-half per cent. And the provision in the aforesaid recited Indenture contained, giving to twenty-five thousand shares of stock a preference in case of foreclosure,

Certain preference to $2,500,000 of stock mentioned in lease, abolished.

shall be and the same is hereby abrogated and made of none effect; and in consideration thereof, after the one million dollars of the Albany City Bonds, issued to the said Railroad Company, shall, by the operation of the sinking fund provided for the payment of said bonds, be paid, the amount to wit: The sum of seventy thousand dollars a year, which the said Canal Company will thus be relieved from paying into the sinking fund and upon said Bonds,

Addition to dividends when Canal Co. shall be relieved of paying into sinking fund and for interest upon Albany loan.

shall thereafter be added to the dividends to be paid to the stockholders, thus making the dividends to be paid by said Canal Company after the said Albany City Bonds are paid as aforesaid, upon the said thirty-five thousand shares of stock hereinbefore provided for nine instead of seven per cent. per annum, to be paid semi-annually, on the days hereinbefore men-

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tioned, for the payment of the semi-annual dividends of three and one-half per cent. And upon the execution and delivery of this Agreement, the said Canal Company shall, upon receiving the bonds hereinafter agreed to be issued to the amount, at par of one million five hundred and ninety-five thousand dollars, cancel and surrender up to the said Railroad Company the aforesaid certificates issued for fifteen thousand nine hundred and fifty shares of stock.

Issue of new mortgage for $10,000,000, which shall include former mortgage of $3,500,000.—Second. That the said Railroad Company, in order to provide for the payment of the Mortgage Bonds by it heretofore issued, and to pay the said Canal Company for the cancelling and surrender of the aforesaid fifteen thousand nine hundred and fifty shares of stock, and also such further sums as
52 the said Canal Company, now or hereafter, may be entitled to for expenditures made upon said demised Railroad and property, shall, in such due and legal form as the counsel of the respective parties hereto may advise, make and execute to the Farmers' Loan and Trust Company of the City of New York, (hereinafter called the Trust Company,) a mortgage to be designated as a "First Consolidated Mortgage," bearing date the first day of April, in the year of our Lord, one thousand eight hundred and *seventy-six*, upon all and singular the railroads, rolling stock, property, rights and franchises covered by and included in the aforesaid recited Indenture, or intended so to be, together with the betterments, improvements and additions thereto made since the making of said Indenture, and together with all the betterments, improvements and additions thereto hereafter made, and including all property hereafter acquired in anywise appertaining to the said Railroads or property, excepting money, shares, securities and things in action, to secure the payment of ten thousand bonds of one thousand dollars each, to be, as hereinafter provided, made, executed and delivered by the said Railroad Company, together with the interest thereon; which mortgage thus made and executed the said Railroad Company shall acknowledge and deliver to the said Trust Company.

Provisions as to issue of bonds.—And the said Railroad Company shall also for the hereinbefore recited purposes, in like due and legal form, from time to time, as hereinafter mentioned, make, execute and deliver to the said Trust Company ten thousand of its Bonds, payable to the said Trust Company or Bearer for one thousand dollars each, all to bear even date with said mortgage and to be made payable on the first day of April, A. D. 1906. Of which ten thousand Bonds, three thousand shall upon the execution of this agreement, be made, executed and delivered by the said Railroad Company to the said Trust Company, and shall bear interest at the rate of seven per centum per annum, to be paid semi-annually; and the principal and interest thereof shall be made payable in lawful money of the United States of America, at the office of the said Canal Company in the City of New York or at such other place in the said City as the said Canal Company may designate.

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And the residue of the said ten thousand Bonds shall be, by the said Railroad Company, from time to time, as requested by
53 the said Canal Company, made, executed and delivered to the said Trust Company so far and to such extent as the same may be required for the purposes hereinbefore mentioned, which Bonds shall bear interest, at the option of said Canal Company, either at the rate of seven per centum per annum, payable semi-annually in lawful money of the United States of America, or at the rate of six per centum per annum, payable semi-annually in gold, or at the rate of six per centum per annum, payable semi-annually in sterling; and the principal of the Bonds that bear interest at the rate of seven per cent. in currency, or six per cent. in gold, shall be made payable at the office of the said Canal Company in the City of New York or at such other place in the said City as the said Canal Company may designate, in lawful money of the United States of America, and the interest thereon shall be made payable at the same place; and the principal of as well as the interest upon such of the said Bonds as bear interest, payable in sterling, shall be made payable in sterling, at such place in the City of London, in England, as the said Canal Company may designate, and the payment of the principal of and interest upon all of the said Bonds which are issued by the said Trust Company for the purposes aforesaid shall be guaranteed by the said Canal Company; and the said Trust Company shall upon the cancellation and surrender by said Canal Company of the said certificates to be issued for 15,950 shares of the stock of said Railroad Company, certify and issue to the said Canal Company 1,595 of the said three thousand Bonds which are now to be made and shall also then certify and issue to the said Canal Company as many more of the said three thousand bonds as may be required to reimburse the said Canal Company; the balance to it then due for the expenditures by it made upon the railroads and property by the hereinbefore recited Indenture demised.

Outstanding bonds to be exchanged for new bonds.—And the said Trust Company shall also, from time to time, certify and issue any of the said Bonds, to them delivered, in exchange at par with an equal adjustment of interest, for the existing outstanding Mortgage Bonds of the said Railroad Company, which amounts in the aggregate to three million, four hundred and fifty thousand dollars ($3,450,000).

And the said Trust Company shall, as fast and as soon as any of the said existing Mortgage Bonds are thus taken up, cancel them and certify the fact to said Canal Company. And the said Trust
54 Company shall also, from time to time, certify and issue to the said Canal Company, any of the said Bonds, to them delivered by said Railroad Company for such amount as may be due to the said Canal Company for moneys expended pursuant to the provisions of the hereinbefore recited Indenture; and such bonds so to be issued to said Canal Company, shall be taken by said Canal Company at par, and all coupons thereof then past due shall be cut off and cancelled before such issue; and it is further provided and

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agreed that in every case of doubt or disagreement as to the amount of bonds so to be delivered by said Trust Company to said Canal Company, either of the parties hereto or the said Trust Company may bring the question before any competent Court of adjudication, and until such adjudication shall be finally made neither of said parties hereto shall be liable to any forfeitures, nor shall these presents or anything herein contained be impaired or made void by any omission to make, or cause to be made such delivery or such acceptance of bonds.

And it is further provided and agreed that there shall, at all times, be retained by the said Trust Company, an amount of said Bonds equal to the then outstanding amount of Mortgage Bonds heretofore issued.

Surrender of stock and issue of new certificates hereunder.—Third. That all the certificates for stock heretofore issued by said Railroad Company and now outstanding except the said certificates for 15,950 shares, shall be called in, and as fast as they are received new certificates shall be issued subject to the provisions of this agreement, but the said Railroad Company shall not be bound to guarantee or insure a compliance with such call.

Form of guarantee.—Fourth. That the said Canal Company shall indorse or stamp upon each Bond so as aforesaid, to be issued by the said Trust Company, a guarantee duly executed under its common seal, in the form following:

The President, Managers and Company of The Delaware and Hudson Canal Company, Hereby, for Value Received, guarantee the payment of the principal of and the interest upon the within bond.

And the said Canal Company shall also endorse or stamp upon the new certificate of stock, hereinbefore provided for a guarantee, duly executed under its common seal, in the form following:

The President, Managers and Company of The Delaware and Hudson Canal Company, Hereby, for Value Received, guar-
55 antees the payment of a semi-annual dividend of three and a half percent. upon the stock represented by the within certificate, to be paid on the first days of January and July in each year, until the Albany City Bonds, which were loaned to the Albany and Susquehanna Railroad Company, to the amount of one million of dollars, shall be paid, by the operation of the sinking fund provided for their payment, and thereafter the said Canal Company guarantees to pay upon said stock four and a half per cent. semi-annually on the same days, subject to the conditions and provisions of the lease made by said Railroad Company to said Canal Company, dated February 24th, 1870, and of an agreement supplemental thereto, dated the 7th day of March, A. D. 1876.

Guaranty to be subject to provisions of original lease.

Total amount of securities to be issued by lessor limited to $13,500,000.—Fifth. That the total amount of stocks and bonds to be issued by said Railroad Company shall never exceed in the aggre-

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gate thirteen millions, five hundred thousand dollars—but nothing in this agreement contained shall be construed as a waiver of the said Canal Company to have a new mortgage made and new bonds issued, in case of the maturity of the bonds by this agreement provided for, as provided in the hereinbefore recited Indenture.

Payment of Trust Company charges.—Sixth. That all the charges of said Trust Company and other expenses of administering the trust hereinbefore provided for, shall be paid by said Canal Company.

Original lease to stand.—Seventh. That all and singular the covenants, agreements and provisions in the aforesaid recited Indenture of February 24, 1870, contained, except so far and to such extent as they are changed, altered or modified by this agreement, shall be and remain in full force the same to all intents and purposes as though this agreement had not been made.

Eighth. That all and singular the covenants, agreements and undertakings hereinbefore contained, shall inure to the benefit of and be binding upon the successors and assigns of the respective parties hereto.

In Witness Whereof, this agreement is signed on behalf of The Albany and Susquehanna Railroad Company by its President, and its Common Seal is hereto affixed and attested by its Secretary, pursuant to a Resolution of its Board of Directors. And this agreement is also signed in behalf of The President, Managers and Company of The Delaware and Hudson Canal Company by its President, and its Common Seal is hereto affixed and attested by its Treasurer, pursuant to a Resolution of its Board of Managers, this, the
56 seventh day of March, in the year of our Lord, one thousand eight hundred and seventy-six.

[Seal The A. & S. R. C. Co.]

THE ALBANY AND SUSQUEHANNA RAILROAD COMPANY,
By J. H. RAMSEY, *President.*

Attest:
W. L. M. PHELPS, *Secretary.*

[Seal D. & H. Canal Company.]

THE PRESIDENT, MANAGERS AND COMPANY OF THE DELAWARE AND HUDSON CANAL COMPANY,
By THOS. DICKSON, *President.*

Attest:
J. C. HARTT, *Treasurer.*

COUNTY OF ALBANY, *ss:*

On the 7th day of March, A. D. 1876, before me came Joseph H. Ramsey, to me known and known to me to be the President of the Albany and Susquehanna Railroad Company, and the same person described in and who executed the foregoing instrument, and

[Marginal notes and number of each paragraph printed in red ink in copy.]

acknowledged to me that he executed the same as such President, and being by me duly sworn, did depose and say that he is such President, and that the seal to said instrument affixed is the common seal of said Company, and that he set the same thereto by authority of said Company and by like authority he signed the same; also before me came William L. M. Phelps, to me known and known to me to be the Secretary of said Company and the same person described in and who executed said instrument, and acknowledged to me that he attested and signed said instrument as such Secretary, and being by me duly sworn did depose and say that he resides in the City of Albany, and is such Secretary, and that he so attested and signed said instrument by authority of said Company.

JACOB G. RUNKEL,
Commissioner of Deeds, Albany, N. Y.

57 STATE, COUNTY AND CITY OF NEW YORK, *ss:*

Be it remembered that on this 10th day of March, in the year of our Lord, one thousand eight hundred and seventy-six, before me personally came Thomas Dickson, who being by me first duly sworn, did depose and say, that he is the President of The President, Managers and Company of The Delaware and Hudson Canal Company, and that as such he signed the foregoing instrument of writing for and on behalf of said Company, and that the seal thereto affixed is the common seal of said Company, and that J. C. Hartt is the Treasurer of said Company, and that the said seal was affixed to the foregoing instrument, and attested by the said Treasurer in deponent's presence, and that the said instrument was thus executed and is by this deponent acknowledged for and on behalf of said Company, as and for its act and deed for the purposes therein expressed, pursuant to a resolution of the Board of Managers of said Company.

THOS. DICKSON.

Sworn to and subscribed before me the day and year above written, witness my hand and official seal.

[SEAL.] JOHN A. PATTISON,
Notary Public, Kings Co.

STATE OF NEW YORK,
City and County of New York, ss:

I, William Walsh, Clerk of the City and County of New York, and also Clerk of the Supreme Court for the said City and County, being a Court of Record, do hereby certify that John A. Pattison has filed in the Clerk's office of the County of New York, a certified copy of his appointment as Notary Public for the County of Kings, with his autograph signature, and was at the time of taking the annexed, duly authorized to take the same, and that I am well acquainted with the handwriting of said Notary Public, and verily believe that the signature to the annexed certificate is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court and County the 10th day of March, 1876.

[SEAL.] WM. WALSH, *Clerk.*

58 EXHIBIT B.

A Word of Caution to Albany and Susquehanna Stockholders.

"It is understood that an effort is being made to secure authority from stockholders of the Albany and Susquehanna R. R. Co. to represent them in a suit to secure increased dividends from the D. & H. Co. If any authority is given there would quite likely be a responsibility therewith for a share in all legal expenses and other costs, and stockholders should be careful about assuming any share in such expense.

The lease under which the D. & H. Co. hold the A. & S. Road provides that the former Company shall pay 4½% *per cent.* semi-annually upon the stock of the A. & S. and the interest upon the bonded indebtedness of the latter company. In the event of the total disbursements per annum, on account of the lease, falling below $490,000 then the rate of interest upon the stock is to be increased to a sufficient extent to cover the difference.

The D. & H. Co. is preparing to retire the bonds of the A. & S. Company in the amount of $10,000,000 which is bearing 6 and 7 per cent. with a new issue bearing 3½ per cent. interest. However, when the old bonds are retired with the new, the D. & H. Co. will still be paying $315,000 interest on the $3,500,000 of stock of the A. & S. and $350,000 on new bonds or an aggregate sum of $665,000 per annum, which is considerable in excess of the minimum sum fixed by the lease. That the stockholders of the A. & S. should expect to share in the saving of interest by the reduced rate on the bonds so long as the cost per annum to the D. & H. does not fall below the specified sum of $490,000 seems unreasonable. That lawyers may seek a case is not unlikely, but stockholders will be wise in refraining to assume any share in expense or authorizing any one to act for them unless convinced, after a careful perusal of the lease, that there are reasonable expectations of succeeding."

59 EXHIBIT C.

To the Stockholders of the Albany and Susquehanna Railroad Company:

Notice is hereby given that a special meeting of the stockholders of the Albany and Susquehanna Railroad Company will be held at the office of the Company, 56 North Pearl Street, Albany, N. Y., on the seventh (7th) day of April, 1905, at 12 o'clock noon, for the purpose of considering and acting upon the following matters:

1. The consenting that the Company, in compliance with the request of The Delaware and Hudson Company under the terms of its lease of the property and franchises of this Company, shall make a mortgage upon its property and franchises to secure an issue of $10,000,000 three and one-half (3½) per cent. forty-year gold mortgage bonds of the Company, bearing interest from April 1, 1906, the payment of the principal and interest thereof to be guar-

anteed by The Delaware and Hudson Company, and shall deliver the said bonds to The Delaware and Hudson Company for the redemption of the $10,000,000 First Consolidated Mortgage Bonds of this Company maturing April 1, 1906; and that at the same time there shall be delivered to The Delaware and Hudson Company the agreement of this Company providing that whenever The Delaware and Hudson Company shall surrender to this Company any of the said new three and one-half (3½) per cent. forty-year gold mortgage bonds, this Company shall issue to The Delaware and Hudson Company in lieu thereof an equal amount at par of four (4) per cent. preferred shares of stock of this Company, preferred both as to principal and dividends, the payment of the latter to be guaranteed by The Delaware and Hudson Company, and that the bonds so surrendered shall be thereupon cancelled.

2. In case due consents shall have been given to the making of a new mortgage by the Company to secure the issue of its $10,000,000 three and one-half (3½) per cent. forty-year gold mortgage bonds to be delivered to The Delaware and Hudson Company for the redemption of the Company's $10,000,000 of bonds now outstanding, and to the making of an agreement for the exchange of such bonds upon the demand of The Delaware and Hudson Company for stock at par; then the authorizing of an increase of the Company's capital stock in the amount of $10,000,000, consisting of 100,000 shares of $100 each, and the use thereof at par in retiring an equal amount at par of the said new bonds upon the surrender of the same by The Delaware and Hudson Company for cancellation; or, if The Delaware and Hudson Company so elect, the issue of said stock at par in the first instance in lieu of such new bonds to The Delaware and Hudson Company for the redemption of the said outstanding bonds; *provided* that under no circumstances shall the aggregate amount of the stock and bonds of the Company outstanding at any time exceed the present amount of $13,500,000 at par.

3. In case an increase of the capital stock of the Company in the amount of $10,000,000 shall have been duly authorized, then the consenting that the same shall be issued as four (4) per cent. preferred stock, preferred both as to principal and dividends, the payment of the latter to be guaranteed by The Delaware and Hudson Company.

The books for the transfer of the Company's stock will be closed from the afternoon of March 17th until the morning of April 8, 1905.

By order of the Board of Directors.

ROBERT OLYPHANT, *President.*
W. L. M. PHELPS, *Secretary.*

Dated Albany, N. Y., March 15, 1905.

61 EXHIBIT D.

Albany & Susquehanna Railroad Company.

ALBANY, N. Y., *March* 15, 1905.

To the Stockholders of the Company:

Under date of February 24, 1870, this Company executed a lease of its franchises and property to The Delaware and Hudson Company. Thereafter this Company executed its First Consolidated mortgage of its franchises and property to The Farmers' Loan and Trust Company of New York, dated April 1, 1876, to secure bonds amounting to $10,000,000, of which $3,000,000 bear interest at the rate of seven (7) per cent. per annum and $7,000,000 bear interest at the rate of six (6) per cent. per annum. These bonds will mature on April 1, 1906.

By the terms of the said lease and of a supplemental agreement dated March 7, 1876, The Delaware and Hudson Company has guaranteed the principal and interest of these bonds and the payment of dividends upon the existing $3,500,000 of the capital stock of this Company at the rate of nine (9) per cent. per annum. The lease provided that if required by The Delaware and Hudson Company in order to protect the leased property and the capital stock of this Company from the consequences of foreclosure and sale at the maturity of the said bonds, this Company would issue in due form its new bonds payable at such times and in such manner as the Delaware and Hudson Company should require, or, at the option of The Delaware and Hudson Company, would issue stock therefor, and would deliver the said bonds or stock to The Delaware and Hudson Company to be negotiated and sold by it, the net proceeds arising therefrom to be applied to the payment of such maturing bonds; and that such new bonds or stock should be sufficient in amount to provide

62 by their net proceeds for the payment of the said maturing bonds; and that the payment of the principal and interest of such new bonds or of dividends upon such new stock should be guaranteed by The Delaware and Hudson Company.

In anticipation of the maturity of these bonds on April 1, 1906, The Delaware and Hudson Company has now requested this Company for the purposes aforesaid to issue and deliver to it $10,000,000 three and one-half (3½) per cent. forty year gold bonds of this Company, bearing interest from April 1, 1906, and secured by a new mortgage upon its property and franchises in satisfactory form, and at the same time to execute and deliver an agreement providing that whenever The Delaware and Hudson Company shall surrender any of said new bonds to this Company the same shall be cancelled and this Company shall issue to The Delaware and Hudson Company in lieu thereof shares of capital stock of equal par value, preferred as to principal and dividends, which latter shall be at the rate of four (4) per cent. per annum and shall be guaranteed by The Delaware and Hudson Company. On the other hand, if The Delaware and Hudson Company shall so elect, it is to have the right in the first in-

stance to take the $10,000,000 of preferred stock at par and to apply the proceeds thereof to the redemption of the said bonds maturing April 1, 1906.

The effect of the proposed arrangement will be, if the said bonds are so issued and used in the first instance, to reduce the rate of interest paid upon this Company's mortgage indebtedness of $10,000,000 from six (6) and seven (7) per cent. to three and one-half (3½) per cent. Should, however, The Delaware and Hudson Company take the said preferred stock, either originally, or later upon the surrender of the bonds issued, then the future interest would be at the rate of four (4) per cent., but the substitution of such stock would result in the extinguishment of all right to enforce by foreclosure and sale a mortgage lien upon the Company's property prior to any rights of the present stockholders, a right which the holders of mortgage bonds would always have, but which the holders
63 of the preferred stock would not have. In either case the situation of the present stockholders of this Company would be greatly improved, and in our opinion the offer of The Delaware and Hudson Company is in every aspect a favorable one for this Company and its stockholders, and the same therefore has been approved by this Board.

The Board of Directors deems it proper, that in view of the prevailing favorable financial conditions, arrangements should now be made in anticipation of the maturity of the existing and outstanding bonds on April 1, 1906, and the Board advises prompt action by the stockholders in accepting the proposition of The Delaware and Hudson Company.

The Board of Directors has therefore called a special meeting of the stockholders to vote upon the subject, as shown by the enclosed notice.

Stockholders approving of the course proposed, will please date, sign and promptly return the enclosed proxy.

Since the proposed action will require a vote of the holders of two-thirds of the entire capital stock of $3,500,000, stockholders will see the importance of a full vote to insure the redemption of the mortgage bonds which have a lien prior to their stock.

The books for the transfer of stock will be closed from the afternoon of March 17th until the morning of April 8, 1905.

By order of the Board of Directors.

ROBERT OLYPHANT, *President.*
W. L. M. PHELPS, *Secretary.*

64 EXHIBIT E.

Proxy.

Know all Men by these Presents, That the undersigned do..... hereby constitute and appoint Robert Olyphant, James H. Manning, George I. Wilber, Robert C. Pruyn and William L. M. Phelps and each or either of them, or a majority of them, attorneys and agents for the undersigned, and in the name, place and stead of the under-

signed, to vote as proxy at the special meeting of stockholders of the Albany and Susquehanna Railroad Company, to be held on April 7, 1905, upon all matters and business which may come before said meeting according to the number of votes the undersigned would be entitled to cast if then personally present, and especially upon the question of increasing the capital stock of the said Company by the issue of one hundred thousand additional shares of one hundred dollars each and upon the question of issuing said additional stock as preferred stock, and upon the question of authorizing the execution and delivery by said Company of a mortgage or deed of trust of its property and franchises in the amount of ten million dollars, conditioned as security for the payment of ten thousand bonds of one thousand dollars each to be issued by said Company.

Witness the hand and seal of the undersigned this — day of ——, one thousand nine hundred and five.

—— ——, [L. S.]

Be sure to date this proxy.

[Endorsed:] U. S. Circuit Court. Filed June 12, 1906. Southern District, New York. John A. Shields, Clerk.

65 *Demurrer.*

United States Circuit Court, Southern District of New York. In Equity.

ÆTNA INSURANCE COMPANY ET AL., Complainants,
against
ALBANY AND SUSQUEHANNA RAILROAD COMPANY and DELAWARE AND HUDSON COMPANY, Defendants.

66 The demurrer of the defendant The Delaware and Hudson Company to the bill of complaint of the Ætna Insurance Company and others, complainants:

This defendant, by protestation, not confessing all or any of the matters or things in said bill contained to be true in such manner and form as the same are therein set forth and alleged, demurs to the said bill and to each and every portion thereof, and for causes of demurrer shows that.

1. It appears by the complainants' own showing by the said bill that they are not, and no one of them is, entitled to the relief prayed by said bill against this defendant, and the said bill does not contain any matter of equity whereon this Court can ground any decree or give to the complainants, or any of them, any relief against this defendant.

2. The said bill is exhibited against this defendant for two distinct and independent matters and causes which have no relation to each other, in one of which the complainants, as stockholders of the defendant Albany and Susquehanna Railroad Company, suing in their own behalf and in behalf of all other stockholders thereof who may

join herein, seek to enforce in the right of their said corporation against this defendant certain alleged claims for unpaid rent belonging solely to said defendant Albany and Susquehanna Railroad Company, and in the other of which the complainants seek to recover of this defendant upon its direct guaranties of dividends made to each of the complainants separately upon the respective certificates of stock of the defendant Albany and Susquehanna Railroad Company held by the complainants. Said two distinct and independent matters and causes are improperly united in the said bill. The complainants sue in respect to said two distinct and independent matters and causes in diverse and distinct capacities.

67 3. So far as said bill alleges that this defendant has failed to fully perform its guaranty of increased dividends made to complainants, as holders of stock of the defendant Albany and Susquehanna Railroad Company, from and after the date of the extinguishment of the Albany City loan by operation of the sinking fund in respect thereto, it appears by the said bill that the complainants have a full, adequate and complete remedy at law, and that the same has not been exhausted so as to entitle them in any case to resort to a court of equity for relief.

4. So far as said bill alleges that this defendant has failed to pay to the defendant Albany and Susquehanna Railroad Company any part of the rent due under the provisions of Exhibit A annexed to the bill, the complainants show in said bill no capacity in themselves to maintain this suit, in that they do not show any prior demand made by them upon the defendant Albany and Susquehanna Railroad Company, its officers, directors or other stockholders, to take action in respect thereto, or any refusal of any such demand, nor do they show in said bill any legal or sufficient reason or excuse for dispensing with such prior demand; and also in that it does not appear from the said bill that all of the complainants were shareholders of the defendant Albany and Susquehanna Railroad Company at the time when it is alleged that this defendant first omitted to pay its full rent under the provisions of Exhibit A annexed to the bill, nor that the shares of such of complainants as were not shareholders at said time have since devolved upon them by operation of law.

5. So far as the said bill alleges that this defendant has failed to pay to the defendant Albany and Susquehanna Railroad

67½ Company any part of the rent due under the provisions of Exhibit A annexed to the bill, the complainants show by their said bill that they have been guilty of gross laches in the enforcement of their alleged rights in respect thereto, and show no excuse whatsoever for such laches. The said bill avers that this defendant has failed to pay over to the defendant Albany and Susquehanna Railroad Company as part of the alleged annual rent due to it, certain savings in annual interest upon a portion of the latter's bonded indebtedness effected prior to the year 1880, and ever since alleged to have been wrongfully retained by this defendant to its own use. The said bill further avers that a number of the complainants have been continuously holders and owners of stock of the defend-

ant Albany and Susquehanna Railroad Company for more than twenty-six years prior to the commencement of this suit.

THE DELAWARE AND HUDSON COMPANY,
By DAVID WILLCOX, *President.*

OPDYKE, LADD & BRISTOW,
Solicitors for said Defendant,
20 Nassau Street, New York, N. Y.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in law.

WM. S. OPDYKE,
Counsel for the Defendant the Delaware and Hudson Company.

67¾ UNITED STATES OF AMERICA,
Southern District of New York, ss:

David Willcox, being duly sworn, says: That he is the president of the above named defendant the Delaware and Hudson Company, and that the foregoing demurrer is not interposed for delay.

DAVID WILLCOX.

Sworn to before me this 13th day of August, 1906.

THOS. J. CURRAN,
Notary Public (132), *N. Y. Co., N. Y.*

(Endorsed:) U. S. Circuit Court, Southern District of New York.—Ætna Insurance Company *et al.*, Complainant, *against* Albany and Susquehanna Railroad Company and Delaware and Hudson Company, Defendant.—Demurrer.—Opdyke, Ladd & Bristow, Attorneys for D. & H. Co., 20 Nassau St., New York City.—U. S. Circuit Court.—Filed Sept. 1, 1906.—Southern District of New York.—John A. Shields, Clerk.

Demurrer overruled with costs. Leave to defendant to answer in 20 days on payment of costs. October 26, 1906. G. C. H., *J.*—U. S. Circuit Court, Southern District of New York.—Filed Oct. 29, 1906. John A. Shields, Clerk.

68 At a Stated Term of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, held at the United States Court Rooms, in the Borough of Manhattan, in the City of New York, on the 26th day of October, in the year of our Lord one thousand nine hundred and six.

Present: Honorable George C. Holt, *Judge.*

In Equity.

ÆTNA INSURANCE COMPANY and others, Complainants,
against
ALBANY AND SUSQUEHANNA RAILROAD COMPANY and DELAWARE AND HUDSON COMPANY, Defendants.

The defendant Deleware and Hudson Company having demurred to the bill of complaint, and the cause having duly come on to be heard upon the said bill of complant and demurrer, after hearing Lewis E. Carr, Esq., of counsel for the said defendant Delaware and Hudson Company, in support of the demurrer, and Adrian H. Joline, Esq., and E. Parmalee Prentice, Esq., of counsel for complainants, in opposition thereto,

Now, on motion of Messrs. Howland, Murray & Prentice, solicitors for the complainants, it is

69 Ordered, that the said demurrer be and it is hereby overruled, with costs to the complainants, and that the said defendant Delaware and Hudson Company may answer the bill of complaint, upon payment of costs, within twenty days after the service upon the solicitors for the said defendant of a copy of this order, with written notice of entry thereof.

GEO. C. HOLT, *J.*

(Endorsed:) United States Circuit Court, Southern District of New York.—Ætna Insurance Company and others, Complainants, *against* Albany & Susquehanna Railroad Company and Delaware & Hudson Company, Defendants.—Order overruling demurrer and notice of settlement.—Howland, Murray & Prentice, Solicitors for Complainants, 35 Wall Street, New York.—Copy received, Oct. 31, 1906. Opdyke, Ladd & Bristow, Attorneys for deft. The Delaware & Hudson Co.—U. S. Circuit Court, Southern District of New York. Filed Nov. 2, 1906.—John A. Shields, Clerk.

70 *Answer of Defendant Albany and Susquehanna Railroad Company.*

United States Circuit Court, Southern District of New York.

AETNA INSURANCE COMPANY ET AL., Complainants,
against
ALBANY & SUSQUEHANNA RAIL ROAD COMPANY and DELAWARE & HUDSON COMPANY, Defendants.

Answer of the Albany and Susquehanna Rail Road Company to the above entitled Bill of Complaint.

The Albany & Susquehanna Rail Road Company, answering the above entitled bill of complaint says:

That it admits each and every allegation and charge in the said bill contained.

That in accordance with the by-laws of this company the annual meeting of its stockholders was held at the City of Albany on Tuesday, the 16th day of October 1906; that prior to the said meeting stockholders interested in the protection of the interests of this respondent issued a circular to all stockholders in the Albany & Susquehanna Rail Road Company asking their support in the election of a new board of directors which should be free from the control of the Delaware Company, and in support of this request the said circular referred to the present suit and to the position taken therein by the members of the board of directors of the Albany & Susquehanna Company opposing the interests of the stockholders in that company; and this respondent attaches hereto a copy of the
71 circular sent to stockholders as aforesaid, marking the same Exhibit 1.

That in response to this appeal Robert Olyphant, then the President of this respondent, issued a circular to stockholders in this company, a copy whereof is hereto attached marked Exhibit 2, and this respondent shows that in said circular the said Robert Olyphant stated that the management of the company wished to facilitate the judicial determination of the questions involved in the present action, and the said Olyphant then and at the same time requested stockholders in this respondent company to give their proxy at the approaching meeting to him, the said Robert Olyphant, David Willcox, Charles A. Peabody, George I. Wilber and Harrison L. Beatty.

That in reply to the foregoing circular, stockholders interested in the prosecution of the above entitled bill issued a circular, a copy whereof is hereto attached and marked Exhibit 3; that the said Robert Olyphant thereafter issued a further circular, a copy whereof is hereto attached and marked Exhibit 4; that in reply to the last named circular the stockholders interested in the prosecution of this action issued a further circular, a copy whereof is hereto attached and marked Exhibit 5, and that with the said last mentioned circular was sent to each stockholder in the Albany & Susquehanna Company, a copy of the demurrer filed in this action by the Albany & Susquehanna Company on the 29th day of September, 1906.

And this respondent alleges that stockholders interested in prosecuting this the above entitled action, in order further to present the existing situation to stockholders and to show to stockholders that the Delaware Company, although professing to desire a judicial determination upon the matters involved herein, nevertheless in fact presented serious obstacles to the progress of this litigation, communicated personally with as many stockholders as it was possible for them to reach, for this purpose sending their agents and
72 personally traveling to the residences of different stockholders in Michigan, throughout the state of New York, Pennsylvania, Connecticut, Rhode Island and Massachusetts; that prior to the filing of the original bill herein complainants had sought the support, assistance and co-operation of stockholders; that after the institution of this suit many stockholders in this respondent company were of opinion that the position taken herein by the Delaware Company and by the Susquehanna Company under its control did

not fairly represent the interests of the Susquehanna Company or of its stockholders; that in the contest for control of the annual meeting of stockholders in this company the only question presented to stockholders related to this litigation and the action of the Delaware Company and of the Susquehanna Company under its control herein; that at the said annual meeting there were cast in favor of the nominees of the Delaware Company 15,441 ballots; that there were cast in opposition to the said nominees 15,501 ballots, and this respondent therefore admits that at the time the original bill herein was filed the Delaware Company controlled the Board of Directors and a majority of the stock in this respondent company, but this respondent asserts that since the filing of the original bill herein and since the filing in the name of this company of the above mentioned demurrer to the original bill herein the Delaware Company has lost control of this respondent corporation.

ALBANY & SUSQUEHANNA RAIL ROAD COMPANY,
By HERBERT S. BARNES, *Solicitor.*

35 Wall St., New York City.

73 EXHIBIT I.

Albany and Susquehanna Rail Road Company.

Stockholders' Protective Committee.

To the Stockholders of the Albany and Susquehanna Rail Road Company:

This Committee has already informed the stockholders in the Albany and Susquehanna Railroad Company of their rights to largely increased dividends due from The Delaware and Hudson Company.

For many years The Delaware and Hudson Company has entirely controlled the Board of Directors of the Susquehanna Company. At the present time the Susquehanna Board is constituted as follows:

Names of directors of Susquehanna Company.	Position in Delaware & Hudson Co.
Robert M. Olyphant	Chairman and Director.
George I. Wilber	Director.
David Willcox	President.
R. Suydam Grant	Director.
Charles A. Peabody	Director.
William S. Opdyke	General Counsel.
Abel I. Culver	Second Vice-President.
Charles A. Walker	Treasurer.
Robert Olyphant	Represented on The Delaware and Hudson Board.
William L. M. Phelps	Employed by The Delaware and Hudson Company as Secretary of the Susquehanna Company.
Robert C. Pruyn	
James H. Manning	

74 The relations which Messrs. Manning and Pruyn bear to The Delaware and Hudson Company are not fully known to the Committee, but these gentlemen are nominees of The Delaware Company upon the Susquehanna Board.

It is essential for the protection of Susquehanna interests to elect at the coming Annual Meeting a new Board which shall act for the Susquehanna Company alone.

That the present Board is incapable of so acting appears from their action in the present controversy.

Last June the Aetna Insurance Company, of Hartford, and certain other stockholders in the Susquehanna Rail Road brought suit, by the Counsel for this Committee, against The Delaware and Hudson Company to collect the increased dividends owing upon Susquehanna stock. This suit is resisted by The Delaware and Hudson Company, acting through its President, Mr. Willcox, and its General Counsel, Mr. Opdyke, both, as appears from the foregoing list, being Directors of the Albany and Susquehanna Company. Among the various matters set up by these gentlemen in reply to the claim of the Aetna Insurance Company are the following:

That stockholders in the Susquehanna Company have "no capacity in themselves to maintain this suit"—in effect that the stockholders' rights must be asserted in the name of the Susquehanna Company by its Board of Directors;

Also, that the stockholders' rights have been lost by reason "of gross laches in the enforcement of their alleged rights in respect thereto."

In other words, these Directors of the Susquehanna Company set up their own neglect as a bar to the claims of the Susquehanna Company, while at the same time they insist upon continuing their control and excluding stockholders from any opportunity to assert their own rights.

75 The Committee, therefore, urgently request all stockholders in the Susquehanna Rail Road Company to execute and return the enclosed proxy as soon as possible.

New York, September 14, 1906.

JOHN HARSEN RHOADES,
ADRIAN H. JOLINE,
GEORGE P. BUTLER, Chairman,
Committee.

EXHIBIT 2.

The Albany and Susquehanna Railroad Company.

SEPTEMBER 20, 1906.

To the Stockholders of The Albany and Susquehanna Railroad Company:

The attention of the management of The Albany and Susquehanna Railroad Company has been called to the circular of the so-called "Stockholders' Protective Committee," consisting of Messrs. Rhoades,

Joline and Butler, dated the 14th day of September, 1906, and asking for proxies in their own favor for use at all stockholders' meetings of The Albany and Susquehanna Company held before November 1, 1909, a period of three years.

The stock books of this Company show no one of the members of this Committee to be a holder of its stock, although the firm of one of them appears to hold about 350 shares. Their interest, therefore, in The Albany and Susquehanna Company, so far as disclosed, seems to be merely that arising under the so-called "Deposit Agreement" of December 22, 1905, which provides that they shall receive not exceeding 15 per centum of the total amount of any benefit received by the depositing shareholders through the efforts of
76 the Committee, and that in estimating this total the Committee shall capitalize the increased future dividends on a 4 per cent. basis. The object, therefore, appears to be to extend the control they now have over such Albany and Susquehanna shares as have been deposited under the said Agreement, over the voting power of all the other shares of the Company.

After the lease of the Albany and Susquehanna Railroad to The Delaware and Hudson Company in 1870, the former directors of The Albany and Susquehanna Company were all continued in office until their several deaths or resignations. During this period no question of difference ever arose between The Albany & Susquehanna Company and The Delaware and Hudson Company. It was found convenient, from time to time, to fill the vacancies so occurring with gentlemen who would be able to attend the Board meetings. Although many of these gentlemen were officers or directors of The Delaware and Hudson Company, their character was such as to give assurance that by no act or omission upon their part would they sacrifice the interest of The Albany & Susquehanna Company to that of The Delaware and Hudson Company.

Some months ago, one or more members of the Protective Committee raised the claims in favor of The Albany and Susquehanna Co. which are referred to in the circular of the Protective Committee, with the President of The Delaware and Hudson Company, who suggested that the claims thus made, with the reasons supporting the same, be stated in writing, in order that the matter might be submitted to the Board of Managers of that Company. No such written statement was, however, so submitted. The Directors of this Company having learned of these facts, naturally supposed that those so asserting claims in behalf of this Company against The Delaware and Hudson Company would make known to the Board of Directors of this Company the reasons which were supposed to justify such
77 claims, even although they had been unwilling to do this fully with The Delaware and Hudson Company. The matter of these supposed claims was however never presented to the officers or Directors of The Albany and Susquehanna Company by the Protective Committee, but in June last a suit to enforce the said claims, was begun in the names of certain stockholders of The Albany and Susquehanna Company, by the members of the Committee, both against The Delaware and Hudson Company and The Albany and

Susquehanna Company, without any previous application to the Company to assert the claims on its own behalf or that of its stockholders.

The management of The Albany and Susquehanna Company is informed that The Delaware & Hudson Company has filed a demurrer to the Bill of Complaint in this suit, mainly upon the ground of the improper joinder of a cause of action existing in favor of The Albany and Susquehanna Company itself, with a cause of action existing solely in favor of the shareholders of The Albany and Susquehanna Company, and that it was in connection with this technical distinction, that the language quoted in the circular of the Protective Committee occurred; so that the position of The Delaware and Hudson Company was in fact that the shareholders alone, and not the Company, could maintain the suit brought so far as it sought to collect "the increased dividends owing upon the Susquehanna stock," referred to in the said Committee's circular. The statement of this circular is therefore misleading in this respect.

The shareholders of this Company need have no doubt that the Directors who have had their confidence for so many years will do all that is necessary to protect all the rights of the shareholders. The questions raised by the Protective Committee, being urged with apparent confidence by gentlemen of position and standing constituting the Protective Committee, must undoubtedly receive a judicial determination. The present management of the Company desires
78 not only to throw no obstacle in the way of such a decision in proper form, but wishes to facilitate the same in every proper way for the equal advantage of each shareholder. They naturally resent, however, the unfair criticism which they find in the Committee's circular and in the Bill of Complaint in the suit already instituted.

Therefore, they appeal with confidence to the stockholders to sign and return to the Secretary of the Company the enclosed proxy, for one year only, in favor of the five gentlemen named therein, who together hold or directly represent about 9,000 shares of the stock of the Albany and Susquehanna Company.

Respectfully, ROBERT OLYPHANT, *President.*

The Albany and Susquehanna Railroad Company.

ALBANY, *September* 20, 1906.

For the convenience of stockholders who may not attend the Annual Election, to be held at the office of the Company, No. 56 North Pearl Street, Albany, N. Y., on Tuesday, the 16th day of October, next, a form of proxy is enclosed; the persons named therein being directors of the above Company, viz.: Robert Olyphant, David Willcox, Charles A. Peabody, George I. Wilber and Harrison L. Beatty.

Very respectfully, W. L. M. PHELPS, *Secretary.*

79 EXHIBIT 3.

Albany and Susquehanna Rail Road Company.

Stockholders' Protective Committee.

To the Stockholders of the Albany and Susquehanna Railroad Company:

Mr. Robert Olyphant, son of Mr. Robert M. Olyphant, Chairman and ex-President of the Board of Directors of The Delaware and Hudson, against which Company this Committee is pressing the claims for rental explained to you in its former circulars, has, as President of the Albany and Susquehanna Company, addressed you a circular dated September 20th.

In this circular Mr. Olyphant endeavors to dissuade you from giving your proxy to this Committee, and asks your proxy for himself and four other gentlemen, three of whom are directors of The Delaware and Hudson Company.

If you are not in sympathy with the claim of the Protective Committee for the collection of unpaid rentals and for increased dividends, or if your dominating interest is with The Delaware and Hudson Company, we cannot of course hope for your support; but Mr. Olyphant's request for your proxy, for the purpose of continuing the control of the Albany and Susquehanna Company by The Delaware and Hudson Board while the Susquehanna Company is suing The Delaware and Hudson Company, is contrary to common sense.

We cannot understand why The Delaware and Hudson directors should insist upon continuing their control of the Albany and Susquehanna except for the purpose of protecting The Delaware and Hudson Company. We do not regard Mr. Olyphant's statements as sincere; and in spite of the assurances which he gives us regarding the character of The Delaware and Hudson directors, we be-
80 lieve that they are no exception to the rule that no man can serve two masters.

Mr. Olyphant's circular is misleading throughout. We call attention to the following particulars:

1. The alarm which Mr. Olyphant seeks to create by emphasizing in italics that the proxy asked for by us in our circular of September 14th, is for *a period of three years,* while that subsequently sought for by him is *for one year only,* should be allayed by noticing that our proxy reads "or until the sooner revocation hereof." This Committee requested your proxy for three years to cover the delays now being interposed by The Delaware and Hudson directors, but whenever you are convinced that this Committee is delaying the prosecution of your claims, against the earnest endeavors of The Delaware and Hudson directors to prosecute the suit which they have thus far failed to institute, you have full power to transfer your support to Mr. Olyphant or others.

2. In urging you to withhold your proxy from this Committee, Mr. Olyphant says:

"The stock books of this Company show no one of the members of this Committee to be a holder of the stock, although the firm of one of them appears to hold about 350 shares. Their interest, therefore, in the Albany and Susquehanna Company, so far as disclosed, seems to be merely that arising under the so-called Deposit Agreement."

Mr. Olyphant has evidently made no endeavor to ascertain and present to you the facts. If he had, he would know that Mr. Rhoades is trustee of the estate of the late Isaac N. Phelps, whose trustees and beneficiaries hold about 3,000 shares of stock now deposited with this Committee, and that Mr. Willcox, President of The Delaware and Hudson, was informed of these holdings by counsel of this Committee in a letter dated December 14,
81 1905, and acknowledged by Mr. Willcox on that date. That at the same time the Chairman of the Committee called on Mr. Willcox and informed him that aside from smaller holdings he had had placed in his hands with full authority to act in this matter 1,000 shares of stock held by Mr. John S. Kennedy, whose stock is now also deposited with this Committee.

These substantial holdings were the basis for the formation of this Committee; but in view of the concentrated holdings in The Delaware and Hudson interest the Committee must look for support both as to deposit of stock and for proxies to the holders of 50 shares or less who constitute in number a large majority of the stockholders.

The Committee has already pointed out to you that the directors of the Albany and Susquehanna who are also directors of The Delaware and Hudson control a large amount of stock which we believe to be fully 9,000 shares as stated in Mr. Olyphant's circular. *4,500 shares of this stock however belong to The Delaware and Hudson Company itself.* We cannot see why these gentlemen ask you to make them your representatives in the prosecution of the suit against The Delaware and Hudson Company because they represent shares owned by the defendant company itself. Mr. Olyphant's circular makes no reference to the character of this holding.

3. We presume it is in reply to our contention that The Albany and Susquehanna directors, being also charged with the protection of The Delaware and Hudson Company's defense, are disqualified to prosecute the Susquehanna Company's claim, that Mr. Olyphant says:

"* * * the character of these gentlemen [the directors] was such as to give assurance that by no act or omission upon their part would they sacrifice the interest of the Albany and Susquehanna Company to that of The Delaware and Hudson Company."
82 And again:

"The shareholders of this Company need have no doubt that the directors who have had their confidence for so many years will do all that is necessary to protect all the rights of the shareholders."

In this regard it may be well to recall that these same gentlemen in March, 1905, requested, in view of that confidence which you had always reposed in them, your proxies for the purpose of authorizing an increased issue of $10,000,000 of Albany and Susquehanna stock. This issue would have resulted in placing the control of your Company absolutely in the hands of The Delaware and Hudson Company, and would have transferred from the present stockholders to The Delaware and Hudson Company nearly three-quarters of any recovery made under the claim your Committee is pressing. The Albany and Susquehanna directors withdrew from this course only when counsel employed by the Depositors in this Committee called their attention to the following initial provision of the Supplemental Contract with the Delaware and Hudson Company and the fact that the contract was referred to by endorsement on each certificate of stock:

"The total amount of the capital stock of the said Railroad Company shall be and the same is hereby fixed and limited to the sum of $3,500,000."

Whether these gentlemen asked your authority in ignorance of this provision, or with knowledge of it sought to deprive you of its benefits, their action in that regard reflects no more credit on their sagacity or integrity than does their endeavor to watch the affairs of the Albany and Susquehanna Company with an eye single to your interests while they remain directors of The Delaware and Hudson, or than does their failure for many years to collect or even
83 claim the rental owing to you, or than does their present anxiety to have the defendant in this action select and direct counsel for the plaintiff.

4. The circular issued by this Committee on September 14, 1906, has already informed you that one of the defenses which The Delaware and Hudson advances is that the Susquehanna Company has lost its rights by the neglect of its Management.

The only attempt which Mr. Olyphant makes to justify the action of the gentlemen who put forward this defense is to assert that "some months ago" the request was made that the claims which the Protective Committee now urge "with the reasons supporting the same be stated in writing in order that the matter might be submitted to the Board of Managers of that [The Delaware and Hudson] Company." Mr. Olyphant now says: "No such written statement was however so submitted."

A written statement was furnished to Mr. Willcox in a letter written to him on December 14, 1905, and acknowledged by him on that date with the statement: "I will submit the matter to the Board in due course."

In view of The Delaware and Hudson's control of the Albany and Susquehanna Company and the proverbial delays of the law it must be evident to you that this Committee will need all the support to be given it by each stockholder.

We therefore urge you if you have not already done so in reply to

our former circular, to sign the enclosed proxy and return to us in the enclosed stamped envelope at your earliest convenience.

New York, September 25, 1906.

JOHN HARSEN RHOADES,
ADRIAN H. JOLINE,
GEORGE P. BUTLER, *Chairman,*
Committee.
CHARLES F. COANEY,
Secretary, 35 Wall Street, New York.

84 EXHIBIT 4.

The Albany and Susquehanna Railroad Company.

OCTOBER 1, 1906.

To the Stockholders of The Albany and Susquehanna Railroad Company:

The circular put forth by the Stockholders' Protective Committee under date of September 25, 1906, requires little answer as it has in general been covered by the circular previously issued by the undersigned.

1. With reference to the insinuation that a statement of the claim of the stockholders in the premises has ever been presented to The Albany and Susquehanna Company, the undersigned learns upon inquiry that upon December 13th and 14th, 1905, Mr. E. W. Sheldon, one of the counsel to the Stockholders' Committee, wrote two letters addressed to Mr. David Willcox as President of The Delaware and Hudson Company, asserting claims against the latter Company, but containing no statement of the full grounds of complaint or argument in support of the same. Mr. Willcox, as such President, replied asking that, in accordance with the practice usual in such cases, the grounds of the claim and the arguments in support of it, be stated with fullness so that the matter could be submitted to counsel; adding, "If you feel you can add nothing to the letters already written, I will submit the matter to the Board in due course," meaning necessarily the Board of Managers of The Delaware and Hudson Company. Thereafter Mr. Sheldon wrote that he would "be glad to comply with your request by laying before you some of the reasons why I cannot accept your contention," and subsequently requested various papers and statements of the facts. These were furnished to him upon January 6, 1906, but nothing was heard from Mr. Sheldon and suit was instituted without anything further from him. It will be observed that this correspondence was ad-
85 dressed to The Delaware and Hudson Company and that no formal statement of the claim has ever been furnished to even that Company, so that the italicized paragraph on the last page of the Protective Committee's circular contains a misleading quotation from Mr. Willcox's letter of December 14, 1905.

In addition Mr. Willcox was not an officer of the Albany and Susquehanna Company and the letter stating that he would submit the

matter to the Board referred in terms to the Board of Managers of The Delaware and Hudson Company. It is clear, therefore, that the claim has never been presented in any manner to the officers of the Albany and Susquehanna Company or any action requested upon their part, and the insinuation that they have neglected any duty in the premises is wholly without foundation.

2. With reference to the suggestion which was made about a year and one-half ago that when the consolidated bonds were refunded they should be ultimately replaced by stock of the Albany and Susquehanna Company, it is sufficient to say that that matter has no present importance. The suggestion was that a fixed obligation should be exchanged for stock of the Company. The management of the Albany and Susquehanna Company believed and still believe that it is good policy to issue stock to take up fixed obligations and that such course did not violate the terms of the supplemental lease. No such claims as those now asserted by the Protective Committee have ever been suggested by anyone; but, in any case, the course proposed would not have deprived the existing stockholders of any rights in the premises because the rights of the new stock were to be strictly limited as to dividends. A considerable majority of the stockholders of the Albany and Susquehanna Company agreed with the management in the view that it was sound policy to replace the bonds by stock. When, however, it became evident that some of the stockholders objected, the suggestion was withdrawn, and
86 the desire of the management to comply with the wishes of all the stockholders was fully shown.

3. The Protective Committee evidently appreciated the force of the criticism that they were not actual stockholders inasmuch as since the issue of the former circular of the undersigned, a few shares of stock have been transferred to the name of each member of the Committee.

4. It is hardly necessary to repeat that the claims alleged to exist in favor of your Company and its shareholders must be submitted to the courts, and that any board of directors of your Company necessarily will co-operate to have that done in a proper manner, and that the counsel of the Protective Committee will have full opportunity to be heard. The benefits of any decision in favor of such claims, will be shared *pro rata* by each shareholder of your Company irrespective of whether or not he has deposited his stock with the Protective Committee.

ROBERT OLYPHANT, *President.*

EXHIBIT 5.

Albany and Susquehanna Rail Road Company.

Stockholders' Protective Committee.

NEW YORK, *October*, 9, 1906.

To the Stockholders of the Albany and Susquehanna Rail Road Company:

On October 1st Mr. Olyphant addressed you his last circular, urging you to withhold your proxies from us, and said:

"It is hardly necessary to repeat that the claims alleged to exist in favor of your company and its shareholders must be sub-
87 mitted to the courts, and that any board of directors of your company necessarily will co-operate to have that done in a proper manner, and that the counsel of the Protective Committee will have full opportunity to be heard."

It is only fair that you should know that on the same date on which Mr. Olyphant signed his circular he signed the demurrer of the Albany & Susquehanna Company in the suit brought by the Ætna Insurance Company, through Counsel for this Committee, against the Delaware & Hudson for the increase of your dividends. A copy of the demurrer is enclosed, and shows clearly the real attitude of obstruction and opposition by the Albany and Susquehanna Board and Mr. Olyphant, its President, against claims urged in behalf of their shareholders.

The meeting for the election of directors is to be held on October 16th. Your proxy should be in our hands at the earliest possible moment. If you have already given your proxy to the present management, it can be revoked by a proxy given now to the Protective Committee.

Yours very truly,

JOHN HARSEN RHOADES,
ADRIAN H. JOLINE,
GEORGE P. BUTLER,
Chairman, Committee.
CHARLES F. COANEY,
Secretary, 35 Wall Street, New York.

[Endorsed:] U. S. Circuit Court. Filed Nov. 3, 1906. Southern District, New York. John A. Shields, Clerk.

88 *Amended Answer of Defendant Delaware and Hudson Company.*

United States Circuit Court, Southern District of New York. In Equity.

AETNA INSURANCE COMPANY ET AL., Complainants,
against
ALBANY & SUSQUEHANNA RAILROAD COMPANY and DELAWARE & HUDSON COMPANY, Defendants.

Amended Answer of the Delaware and Hudson Company, Defendant.

The Delaware and Hudson Company, made a party defendant under the name of "Delaware & Hudson Company" in the bill of complaint of Aetna Insurance Company, Connecticut Trust & Safe Deposit Company, trustee, &c., Security Company, trustee, &c., Atwood Collins, executor, &c., Francis R. Cooley, Charles P. Cooley and Melancthon W. Jacobus executors, &c., Jonathan B. Bunce, Drayton Hillyer and Archibald A. Welch, trustees, &c., John R. Redfield, trustee, &c., Atwood Collins and John R. Redfield, trustees, &c., John D. Browne, Lucius A. Barbour and Francis Parsons, trustees, &c., Mary Danesi, Fanny M. Barclay, Rhode Island Hospital Trust Company, trustee, &c., and Howard O. Sturges, William L. Hodgman and Herbert J. Wells, trustees, &c., against this defendant and The Albany and Susquehanna Railroad Company, sued as Albany & Susquehanna Railroad Company, now and at all times hereafter saving to itself all and all manner of benefit of exception or otherwise that can or may be had or taken to the
89 many errors, uncertainties and imperfections in the said bill of complaint, and at all times protesting that this Honorable Court has not jurisdiction of the suit instituted by the filing of the said bill of complaint; and further protesting that this Court should not entertain the said bill of complaint inasmuch as the same unites two distinct and separate alleged matters and causes which have no relation to each other, and as to which separate and independent claims are respectively asserted in diverse and distinct capacities, and further protesting that as to one of the said matters and causes the complainants have full, adequate and complete remedy at law which has not been exhausted, for answer thereto, or to so much thereof as this defendant is advised that it is material or necessary for it to make answer to, answering says:

FIRST. *To so much of the said bill of complaint as alleges matters equally pertinent, if not all pertinent, to both causes of action alleged by the bill this defendant answering says:*

This defendant admits that both it and its co-defendant The Albany and Susquehanna Railroad Company (hereinafter in this answer called the "Susquehanna Company"), are corporations organized and existing under the laws of the State of New York, and

that the allegations of the said bill of complaint respecting the organization of the said Susquehanna Company, its capitalization, the construction of its railroad, the making of its mortgage bonds and the loan to it of $1,000,000 of bonds of the City of Albany are substantially correct, but this defendant craves leave to refer upon the trial of this suit to the originals of the mortgages securing the payment of all the said bonds, for greater certainty as to the terms thereof. This defendant was created such corporation under the name of "The President, Managers and Company of the Delaware and Hudson Canal Company" by an act of the legislature of the State of New York passed April 23, 1823, being Chapter 238 of the Laws of 1823; and its corporate name was changed by an act
90 of the said legislature passed April 28, 1899, to "The Delaware and Hudson Company." It acquired power to lease railroads under Chap. 841 of the Laws of 1867 of the said State.

This defendant does not know, and cannot set forth as its belief or otherwise, whether or not it is the fact that the several complainants are respectively the holders of the amounts of shares of the capital stock of its co-defendant the Susquehanna Railroad Company alleged in their said bill of complaint in that behalf; or whether or not it is the fact that the several complainants have been holders of such shares of stock for the respective periods of time set forth in their said bill of complaint; and, therefore, this defendant leaves the complainants to make such proof thereof as they shall be advised.

This defendant admits for the purpose of this suit, that the respective citizenship and residence of the several complainants are correctly set forth in the said bill of complaint.

This defendant admits that on February 24, 1870, there was made between itself and its said co-defendant, the Susquehanna Company, a Lease of the railroad and railroad property of the said Susquehanna Company to this defendant; and that on March 7, 1876, a Supplemental Contract modifying the aforesaid Lease was made between the said two defendants, substantially correct copies of which Lease and Supplemental Contract are annexed to the said bill of complaint as "Exhibit A"; but this defendant for greater certainty as to the exact wording of the said Lease and Supplemental Contract prays leave to refer to the originals thereof upon the trial of this suit. This defendant denies, however, that the meaning and effect of the said Lease and of the said Supplemental Contract are correctly set forth in the said bill of complaint.

This defendant denies that on the 18th day of December, 1905, or at any other time it caused to be published a statement, of which an alleged copy is attached to the said bill of complaint and
91 marked "Exhibit B," or that it knew anything as to such statement until after the publication thereof. Such statement did not correctly set forth the views of this defendant as to the controversy therein referred to.

SECOND. *To so much of the said bill of complaint as alleges or claims that this defendant has failed to pay to its co-defendant, the Susquehanna Company, any of the rental at any time owing by this*

defendant to its said co-defendant under the terms of the said Lease and Supplemental Contract, this defendant further answering says:

At the time when the aforesaid Lease by the Susquehanna Company to this defendant was made, to wit, on February 24, 1870, the railroad of the Susquehanna Company covered by the said Lease had been in operation for a little more than a year, and its construction and equipment were both incomplete in many respects. The Susquehanna Company had then issued only $2,212,600 at par of its capital stock, including large amounts subscribed for by the towns and other municipalities along its line and including $95,000 of stock which had been issued to certain subscribers upon the payment in cash of ten per centum of their subscriptions, hereafter in this answer more fully mentioned, for $950,000 of its capital stock. The said Company had then issued $1,000,000 of its first mortgage seven per cent. bonds, $2,000,000 of its second mortgage seven per cent. bonds, and $186,000 (and no more) of an authorized issue of its $500,000 third seven per cent. mortgage bonds. It had received as a loan from the City of Albany $1,000,000 of the six per cent. Bonds of that city, and had secured the payment of the principal of the said bonds and of six per cent. annual interest thereon together with an annual contribution of one per centum thereon toward a sinking fund for the payment of the said bonds, by a mortgage having an equal lien with its first mortgage. Its net earnings from its railroad were not sufficient to pay its fixed charges, and it had a considerable floating debt and was also in urgent need of funds to enlarge both its equipment and railroad facilities, as well as to
92 pay the cost of an expensive litigation. The prospect of paying dividends upon its stock was very remote.

In this situation the Susquehanna Company entered into negotiations with this defendant for a long lease of its railroad upon a basis which should provide for the payment of all the fixed charges upon the railroad property, including taxes imposed upon the demised railroad property and effects or upon the business done upon the leased railroad, and yield over and above the same an amount equal to seven per cent. dividends upon the capital stock of the Susquehanna Company. It was arranged that the Susquehanna Company, for the purpose of paying its floating debt, should be at liberty to issue the remaining $314,000 of the issue of $500,000 of its third mortgage bonds, and to issue an additional amount of $287,400 of its capital stock which would make its total capital stock $2,500,000; thus making its then annual fixed charges, including the payments under its mortgage to the City of Albany, $315,000 and its dividend fund $175,000, the two amounts aggregating $490,000. It was further arranged that this defendant as lessee should guarantee to the holders of the outstanding bonds of the Susquehanna Company, and of its bonds thereafter issued, the payment of the interest thereon, according to their terms, but not the payment of the principal thereof; and should also guarantee to the holders of the shares of stock of the Susquehanna Company at any time outstanding the payment of 3½ per cent. semi-annual dividends thereon; and should pay such interest and dividends to such bondholders and stock-

holders directly by way of payment of the aforesaid rental. It was further arranged that this defendant should pay directly to the Susquehanna Company $1,000 annually to defray the cost of maintaining the corporate existence of the said Company. It was also arranged that this defendant, the lessee, should from time to time make needed improvements upon the leased railroad, and should receive in payment of the cost of such improvements new issues of bonds or stock of the Susquehanna Company at par up to
93 such amount as would make its total capitalization and mortgage debt not over $15,000,000, and that thereafter the cost of all further improvements made by the defendants should be borne by this defendant itself.

Thereupon the said Lease of February 24, 1870, was made and entered into between this defendant and the Susquehanna Company, and this defendant entered upon the leased premises on the 1st day of March, 1870. Thereafter until March 7, 1876, this defendant fully and duly paid to or for the account of the Susquehanna Company all and every part of the rental required to be so paid by this defendant under the terms of the said Lease; and ever since the making on March 7, 1876, of the so-called "Supplemental Contract" between this defendant and the Susquehanna Company, this defendant has fully and duly paid to the Susquehanna Company or for its account all and every part of the rental required by the terms of the said Lease and Supplemental Contract; and this defendant expressly denies each and every allegation of the bill that this defendant has ever failed to pay all and every part of such rental. No complaint has ever been made to this defendant by the said Susquehanna Company that this defendant had in any respect failed fully to pay all of said rental, and no demand has ever been made of this defendant by the said Susquehanna Company for the payment of any further amounts by way of rental under the said Lease or Supplemental Contract, or for any accounting in respect thereto.

It is not true as alleged in the bill of complaint that this defendant in and by the said Supplemental Contract agreed to pay annually as rental for the demised property the sum of $560,000 in addition to paying interest upon all the bonds of the Susquehanna Company which should be issued as provided by the Supplemental Contract. Neither is it true that in the original Lease this defendant had agreed to pay annually after January 1, 1871, a minimum rental of $490,000 and in addition thereto interest or dividends of
94 seven per cent. upon all new securities of the Susquehanna Company which should be issued under the provisions of the Lease for additions or enlargements. The provisions of the original Lease which are quoted in the bill of complaint required this defendant to make only the following payments by way of rental: three per centum semi-annual interest on $1,000,000 Albany City Bonds together with contributions of $5,000 semi-annually to a sinking fund established for the payment of the said Bonds; 3½ per cent. semi-annual interest on not exceeding $3,500,000 of the lessor's bonds issued or to be issued under its first, second and third mortgages theretofore made; 3½ per cent. semi-annual

dividends upon not exceeding $2,500,000 of the lessor's capital stock; which payments of interest and dividends were to be made directly to the respective bondholders and stockholders, but until all the said $3,500,000 bonds and $2,500,000 stock had all been actually issued, an amount equal to the interest and dividends upon any of such bonds or stock not so issued, was to be paid directly to the Susquehanna Company. These provisions of the said Lease so quoted, did not in terms or in effect provide that any payments, by way of rental or otherwise, should be made by this defendant to the Susquehanna Company, after its existing $3,500,000 bonds had been paid, in lieu of the $245,000 theretofore required to pay the annual interest upon the said existing bonds; it not being intended that these bonds should be paid by the Susquehanna Company itself or from the rentals, but that the same should be redeemed by a new issue of its bonds, the interest on which should be guaranteed and paid by this defendant; and full provision as to this was made by other portions of the said Lease, which provisions will be referred to later in this answer.

After this defendant entered into possession of the demised property under the Lease, the Susquehanna Company disposed of and issued the remaining $314,000 of its third mortgage Bonds, and also disposed of and issued the $287,400 of its capital stock necessary to make its total capital stock $2,500,000; and thereafter this defendant guaranteed and paid the interest and dividends upon
95 such bonds and stock to the holders thereof, having before paid the amount thereof directly to the lessor. In May, 1871, this defendant converted $50,000 of the third mortgage or equipment Bonds of the Susquehanna Company held by this defendant into 500 shares of the capital stock of the Susquehanna Company, thus making the total issue of the capital stock of the Susquehanna Company $2,550,000, the total mortgage issue being reduced to $3,450,000, and thereafter this defendant paid interest and dividends upon the said amounts respectively.

The other portions of the original Lease, before in this answer referred to, provided that when any of the said $3,500,000 bonds of the Susquehanna Company, secured by its then existing mortgages should mature, new bonds or stock should be issued by the Susquehanna Company to pay or redeem its said bonds, and that this defendant should thereupon endorse upon any new bonds or stock a guaranty of the payment of the interest or dividends called for by the same, without prescribing what should be the rate of interest upon any new bonds so issued, whether greater or less than 7 per cent.; thereby clearly substituting the obligations of these new guarantees for the prior obligation to pay, by way of rental, the interest upon the former bonds redeemed by the proceeds of the new guaranteed securities. These provisions are the only provisions of the said original Lease which imposed upon this defendant any obligation to pay by way of rental, after the maturity and payment of the $3,500,000 bonds secured by mortgages of the Susquehanna Company made prior to February 24, 1870, any amounts in addition to seven per cent. dividends upon the lessor's stock, except in respect

to new securities issued for betterments and the aforesaid $1,000 annual payment.

The Lease having provided in terms for the part payment for such betterments by the issue of 9,500 shares of the stock of the Susquehanna Company upon the payment of the unpaid ninety per centum of the existing subscriptions therefor, and it appearing that
96 950 of the said shares had already been issued as full paid shares to the subscribers, who had paid ten per centum, or $95,000, upon such subscription, as before in this answer set forth, it was arranged between the Susquehanna Company and this defendant that this defendant should receive the remaining 8,550 of such 9,500 shares as full paid stock in payment of expenditures made by it for improvements on the railroad to that amount. This defendant thus received the said shares, but no dividends were required thereon until 1876.

Thereafter and before July 26, 1872, this defendant had expended the amount of $1,595,000 in improvements upon the demised property, in addition to the amount of $855,000 which had been paid for in shares of capital stock as aforesaid. The Susquehanna Company thereupon issued to this defendant, under the provisions of the Lease, in payment for such expenditures the additional amount of 15,950 shares of its capital stock before it had formally made any increase of its capital stock beyond the amount of $4,000,000, so that the issue of some of the said 15,950 shares afterwards appeared to be without authority of law.

This defendant after July, 1872, continued to make expenditures in improving the demised property, and under the terms of the Lease was entitled to receive new bonds or stock of the Susquehanna Company for the amount thereof, but prior to the year 1876 no plan had been devised by which any satisfactory issue of such securities could be made. It was known that the $450,000 outstanding third mortgage bonds of the Susquehanna Company would mature on May 1, 1881, its $2,000,000 second mortgage bonds on October 1, 1885, and its $1,000,000 first mortgage bonds on July 1, 1888; and it seemed expedient that a consolidated mortgage issue should be arranged, sufficient in amount to supply the fresh money which would be needed for improvements as well as to refund the then outstanding mortgage bonds at or before their respective maturities. Meanwhile other questions had arisen between the Susquehanna Company and this defendant as to the construction of various
97 clauses of the Lease of February, 1870, among others, as this defendant believes, being a question as to whether this defendant would be obliged to continue the payment of $70,000 of the rental then paid, after the $1,000,000 Albany City Bonds had been paid through the operation of the sinking fund established for that purpose, to which fund annual contributions were to be paid as part of the rental under the said Lease, and a question as to the rates of interest to be fixed for any additional bonds which would have to be issued for improvements and to refund the old bonds. In seeking to arrange these matters, this defendant, on the one hand, desired that there should be abrogated the preference given by the terms of the Lease to the $2,500,000 of capital stock and the $3,-

500,000 of mortgage Bonds named in the Lease over any bonds or stock subsequently issued, in order to give greater value to any new mortgage securities; and the Susquehanna Company desired on the other hand to make plain, what was before doubtful, that the annual payment of $70,000 in respect to the Albany City Bonds, should be continued after the said bonds were paid through the contributions to the sinking fund, and that this should be done by increasing the guaranteed dividends to nine per cent. annually, and further that the said 15,950 shares of stock should be exchanged for bonds.

Accordingly on March 7, 1876, a new agreement was made between the Susquehanna Company and this defendant, being the agreement referred to in the bill of complaint as the "Supplemental Contract." When this Supplemental Contract was made the Susquehanna Company still remained under the same management as that which existed in 1870 when the original lease was made, Mr. J. H. Ramsey, who had been President of the Susquehanna Company from September 1, 1864, being still the President of that Company, with substantially the same Board of Directors which made the original Lease, and its terms were decided only after considerable negotiation.

98 This contract was submitted to and ratified by the stockholders of the Susquehanna Company on April 25, 1876, by the unanimous vote of more than two-thirds of the stockholders represented at such meeting. This contract recited that questions had arisen as to the construction of the Lease and as to the rights and liabilities of the parties thereunder and also as to the legality of the issue of 15,950 shares of the stock of the Susquehanna Company, and that both parties desired to have all such questions and the rights and liabilities of the parties under the Lease definitely settled.

This Supplemental Contract provided substantially as follows:

1. The stock of the Susquehanna Company was fixed at and limited to the sum of $3,500,000, to be represented by 35,000 shares of $100 each, upon which this defendant should guarantee and pay upon the first days of January and July in each year to the holders thereof a semi-annual dividend of 3½ per cent. The provision of the Lease giving a preference to 25,000 shares of stock in case of foreclosure was abrogated. In consideration thereof, after the $1,000,000 of the Albany City bonds issued to the Susquehanna Company "shall, by the operation of the sinking fund provided for "the payment of said bonds, be paid, the amount, to wit, the sum "of seventy thousand dollars a year, which the Delaware Company "(this defendant) will thus be relieved from paying into the sink-"ing fund and upon said bonds, shall thereafter be added to the "dividends to be paid to the stockholders, thus making the divi-"dends to be paid by said Delaware Company, after the Albany "City bonds are paid as aforesaid upon the said 35,000 shares here-"inbefore provided for, 9 per cent. instead of 7 per cent. per annum, "to be paid semi-annually on the days hereinbefore mentioned for "the payment of the semi-annual dividends of 3½ per cent."

99 2. The Susquehanna Company, in order to provide (*a*), for payment of the mortgage bonds heretofore issued; (*b*), for paying this defendant for surrendering said 15,950 shares

of stock, and (*c*), for such further sums as this defendant, then or hereafter, should be entitled to for expenditures upon the property, should execute to a Trust Company as trustee, a mortgage to a trustee, bearing date April 1, 1876, and securing the payment of 10,000 bonds of $1,000 each; the payment of the principal and interest of all of these bonds to be guaranteed and paid by this defendant directly to the bondholders. Of these bonds, 3,000 were, upon the execution of this contract, to be delivered by the Susquehanna Company to the trustee, and should bear interest at the rate of 7 per cent. per annum. The residue of the said bonds issued from time to time were to be delivered by the Susquehanna Company to the trustee as requested by this defendant so far and to such extent as the same might be required for the purposes before mentioned; these bonds should bear interest at the option of this defendant either at the rate of 7 per cent. per annum in currency, or at the rate of 6 per cent. per annum in gold.

3. The trustee should, upon the cancellation and surrender by this defendant of the certificates issued for 15,950 shares of stock of the Susquehanna Company, certify and issue to this defendant, 1,595 of the said 3,000 7 per cent. bonds which were then to be made, and should then certify and issue to this defendant as many more of the said 3,000 bonds as should be required to reimburse this defendant for balances due for the expenditures by it made upon the property. The trustee should also from time to time certify and issue further bonds in exchange at par for the then outstanding $3,450,000 7 per cent. mortgage bonds of the Susquehanna Company, and should from time to time certify and issue to this defendant further bonds for such amounts as should be due
100 to this defendant for moneys expended pursuant to the provisions of the Lease.

4. All certificates of stock should be called in and new certificates issued subject to the provisions of this agreement. This Company should endorse its guarantee upon all stock and bonds, the latter to be guaranteed both as to principal and interest. In the case of the stock the guarantee should provide that after the Albany City bonds should "be paid by the operation of the sinking fund provided for "their payment, the Delaware Company (this defendant) guaran-"tees to pay upon said stock 4½ per cent. semi-annually on the first "days of July and January."

5. The total amount of stock and bonds to be issued by the Susquehanna Company should never exceed in the aggregate $13,500,000, but nothing should be construed as a waiver by this defendant of its right to have a new mortgage made and new bonds issued in case of the maturity of the bonds provided for in this agreement.

Provisions were thus fully made in this contract as to every item of rental to be thereafter paid by this defendant to the Susquehanna Company in respect to the demised property, whether by way of interest upon bonds or dividends upon stock or otherwise, and to that extent the Supplemental Agreement necessarily changed, altered, modified and superseded every provision of the original Lease in

respect to the payment of rental, and thereafter the only payments to be made by way of rental by this defendant to the Susquehanna Company were those stipulated by the terms of the said Supplemental Contract.

The terms of this contract imposed upon this defendant the obligation to guarantee the payment of the principal of the bonds of the lessor, whereas before it was bound only to guarantee the interest thereon, and at the same time it reduced the amount of securities of the Susquehanna Company which this defendant could
101 receive for the cost of betterments made to the demised property, in the amount of $1,500,000.

This Supplemental Contract authorized the issue of new Consolidated Bonds in exchange at par for any and all of the outstanding Mortgage Bonds of the Susquehanna Company amounting to $3,450,000. Accordingly, from time to time, beginning with the month of December, 1876, and extending into the month of October, 1880, $660,000 of said outstanding Bonds of the Susquehanna Company were exchanged at par for new Consolidated Bonds bearing seven per cent. interest, and thereafter the balance of the said outstanding Bonds of the Susquehanna Company were from time to time exchanged at par for new Consolidated Bonds bearing only six per cent. interest, this defendant having elected, under its option in that behalf, that $7,000,000 of the new Bonds should bear only six per cent. interest. This defendant further says, upon information and *behalf*, that the control of the Susquehanna Company by a majority of its original directors continued for many years thereafter and until all of the said former seven per cent. bonds had been exchanged for such new bonds, and in the meantime no officer or director or stockholder of the Susquehanna Company made any claim that this defendant was bound to pay to the Susquehanna Company the one per cent. saving arising from the exchange of certain of the seven per cent. Bonds for six per cent. Bonds.

The Supplemental Contract had given to this defendant the option of having the new $3,450,000 of Consolidated Bonds, which were to be issued in exchange for the outstanding seven per cent. bonds of the Susquehanna Company, bear either seven per cent. or six per cent. interest, necessarily implying that this defendant would itself be directly interested in the result of fixing a higher or lower rate of interest upon such bonds, as this defendant insists was the fact under the terms of the original Lease. All parties to the contract early adopted a construction of the original Lease and Supplemental Contract, which entitled this defendant to the
102 benefit of any saving in the rate of interest to be paid upon the mortgage issues of the Susquehanna Company, and on the other hand imposed upon this defendant the burden arising from any increase in such rate of interest.

This contemporaneous construction has remained without question for a period of nearly thirty years. This was the construction of the Lease and Supplemental Contract then, as now, understood by this defendant, and as this defendant then believed and still believes by the Susquehanna Company itself; and this defendant, from the be-

ginning, has acted in reliance upon that construction in conducting the operations of the demised property under the Lease. Even under this construction, and notwithstanding all savings made by the reduction of interest upon the refunding of the mortgage bonds of the Susquehanna Company, the burdens of this defendant as lessees were largely increased under the Supplemental Contract.

No claim such as is set forth in the said bill was ever made against this defendant on behalf of the Susquehanna Company, until the months of November or December, 1905, when claims to that effect were, for the first time, asserted by those who afterwards promoted this suit, as will be more fully set forth later in this answer. This defendant therefore insists that there has been gross laches on the part of these complainants in seeking to enforce the said alleged claims against this defendant, and that this suit in that behalf should not now be entertained by this Court.

This defendant further answering denies that it has at any time failed to pay any amount by way of rental which it was bound to pay to the Susquehanna Company under the said Lease or under the said Supplemental Contract. It admits that it has not paid to the Susquehanna Company since the payment or discharge of any of its $3,450,000 of bonds secured by the mortgages existing when the said Supplemental Lease was made, any amount as representing any saving of interest by reason of the fact that some of the new bonds of the Susquehanna Company issued to take the place of any of
103 the said former bonds, bore less than seven per cent. interest, but it denies that it was bound to make any such payment. It admits that the bonds of the Susquehanna Company maturing April 1, 1906, were retired by the issue of new bonds of that Company bearing only three and one-half per cent. interest, but it denies that it should pay to the Susquehanna Company for its stockholders or otherwise any amount which it is thereby relieved from paying as interest upon the former bonds of the Susquehanna Company. It further says that on June 30, 1906, this defendant was required to pay to the State of New York by way of tax upon the mortgage securing the said new three and one-half per cent. bonds, the amount of $12,465.75 being at the rate of one-half of one per cent. per annum upon the said bonds for the period between April 1 and July 1, 1906.

This defendant denies that it is true, as alleged in the bill of complaint, that this defendant insists that it has a right to credit all sums paid under said Lease, upon any rental such as is claimed by the complainants to have been constituted under the said Lease as a so-called minimum rental; and this defendant denies that any so-called minimum rental was constituted under the said Lease beyond the period when the $3,500,000 of bonds of the Susquehanna Company issued under its so-called first, second and third mortgages were in fact outstanding; and the claims made or insisted upon by this defendant in that behalf are those which have been set forth in this answer. It admits that certain provisions of the said Lease gave certain preference to the first, second and third mortgage bonds of the Susquehanna Company and to the $2,500,000 capital stock mentioned in the said Lease, and it craves leave to refer to the provisions of the said Lease

in that behalf, and denies that the meaning thereof is correctly set forth in the bill of complaint.

This defendant admits that $2,790,000 and no more of the consolidated bonds of the Susquehanna Company, bearing six per
104 cent. interest, and $660,000 of the consolidated bonds bearing seven per cent. interest, were under the terms of the Supplemental Contract issued in exchange for the outstanding $3,450,000 of the seven per cent. mortgage bonds of the Susquehanna Company, and that the remaining $6,550,000 of the said consolidated bonds, of which $2,340,000 bore seven per cent. interest and $4,210,000 six per cent. interest, were issued to this defendant for betterments made to the leased property, but it denies that there was any agreement as to the application upon the rental of the interest paid by this defendant on any particular class of the said bonds. It admits that the $10,000,000 of bonds issued by the Susquehanna Company on or about April 1, 1906, and guaranteed by this defendant, were used for the purpose of taking up bonds issued under the said consolidated mortgage to an equal amount, but it denies that the said new bonds represent or include any other bonds.

This defendant denies that all of the said $3,450,000 of bonds of the Susquehanna Company bearing seven per cent. interest which were outstanding at the time of the making of the said Supplemental Contract, were, prior to the year 1880 or at any other time, retired by the issue of new bonds bearing six per cent. interest, but says that only $2,790,000 of the same were so retired by the issue of new bonds bearing six per cent. interest, and that such retirement was not wholly effected until November, 1888; and it further denies that upon the retirement of any of the said bonds by the issue of new six per cent. bonds, this defendant was bound to pay either to the said Susquehanna Company or to its stockholders the difference between six and seven per cent. interest upon the said bonds, or that any such amount should have been added to the dividends upon the stock of the Susquehanna Company, or that if so added it would have increased such dividends in the amount of one per cent. annually; and it further denies that there is now due and owing from this defendant to the Susquehanna Company any amount in that behalf, or that if any such amount were owing by this defendant to the Susque-
105 hanna Company the same should be paid to the stockholders of the Susquehanna Company, or that any amount is due to the complainants by reason of the matters set forth in the bill of complaint; and this defendant further answering says that if any money were owing to the Susquehanna Company from this defendant by reason of the matters alleged in the bill of complaint, this defendant before paying the same would be entitled to deduct large amounts of money which it has been compelled to pay for the account of the Susquehanna Company in order to retain quiet possession of the leased property, such as the Susquehanna Company covenanted in and by the said Lease and Supplemental Contract this defendant should always have and enjoy.

And this defendant claims the benefit of the provisions made in and by the Statute of Limitations made by Section 381 of the Code

of Civil Procedure of the State of New York respecting limitations of actions, and of all other statutes of limitations, in bar to the relief sought by the plaintiffs in this suit in respect to the claim that this defendant has failed to pay to its co-defendant, the Susquehanna Company, any of the rental accruing under the terms of the said Lease and Supplemental Contract, in like manner as if this defendant had pleaded the same.

THIRD. *To so much of the bill of complaint as alleges matters in support of the right claimed by the complainants to prosecute, on behalf of The Albany and Susquehanna Railroad Company, the alleged claims of the said Susquehanna Company against this defendant, this defendant further answering says:*

The complainants do not show in the said bill of complaint any capacity in themselves to maintain this suit, in that they admit that they have not made any prior demand upon the defendant, the Susquehanna Company, its officers, directors or upon the stockholders of the said Company or any of them, to take any action in re-
106 spect to the said alleged claims and that therefore there has never been any refusal of any such demand; and in that they fail to show in the said bill of complaint any legal or sufficient reason or excuse for dispensing with such prior demand; and in that it does not appear from the said bill that all or any of the complainants were shareholders of the said Susquehanna Company at the time when it is alleged that this defendant first omitted to pay its full rent under the provisions of Exhibit A annexed to the said bill of complaint, or that the shares of such of the complainants as were not shareholders at the said time have since devolved upon them by operation of law.

This defendant further answering says that it is not true as alleged in the said bill that the said Susquehanna Company has at any time substantially ceased to exist save as a continuing source of title for this defendant as lessee and for the protection of its interests, or that all the active functions of the Susquehanna Company were assumed or performed by this defendant as lessee. This defendant admits that as lessee it was given by the Susquehanna Company the exclusive management and control of the leased property, but says that the power to enforce the said Lease and also the control of the rental necessarily remained with the lessor, except so far as under the said Lease and Supplemental Contract this defendant was required to guarantee and pay portions of such rental to the holders of the bonds and stock of the Susquehanna Company. This defendant further charges and avers that under the said Lease and Supplemental Contract, the said Susquehanna Company agreed to maintain at all times its corporate existence, and that it has done so continuously since the execution of the said Lease; and that the complainants in their said bill of complaint themselves assume and assert that the corporate existence of the said Susquehanna Company has in fact continued so far as necessary for the creation and maintaining of legal rights in its behalf against third persons, so that the said bill of complaint in that behalf proceeds upon the ground of the existence of
107 legal rights in favor of the said Susquehanna Company as an existing corporation. It is true that in and by the said Lease the Susquehanna Company covenated to perform all such acts as

might be necessary for the due protection of this defendant as lessee, at the expense however of this defendant, and authorized this defendant, as far as it could so do, to use the name of the Susquehanna Company whenever necessary or proper for the enforcement of the rights of this defendant against third parties; but these were covenants to be performed by the Susquehanna Company itself, and it was therefore necessary under the provisions of the Lease that the corporate existence of the Susquehanna Company should continue after the said Lease as fully as before the same, as indeed the rules of law necessarily required. The Susquehanna Company still possesses and enjoys all its property and franchises, and the State of New York annually imposes and collects franchise taxes upon the Susquehanna Company as an existing corporation. No assignment or surrender by the Susquehanna Company to its stockholders, as such or as individuals, of its property or other rights against this defendant or other third persons, was ever made or could have been lawfully made by the Susquehanna Company. Whatever rights exist against this defendant by reason of non-payment of any portion of the rental required by the said Lease and Supplemental Contract to be made to the Susquehanna Company, necessarily exist in favor of the Susquehanna Company itself, and not in favor of its stockholders.

This defendant further says that the said Susquehanna Company ever since the making of the said Lease has been managed by its own Board of Directors regularly elected annually by its stockholders; and that its present Board of Directors is composed wholly of individuals who directly represent the complainants.

This defendant admits that at the time when this suit was instituted a majority of the Board of Directors of the Susquehanna Company were individuals who were also either officers or
108 directors of this defendant, being the persons mentioned in the bill of complaint. This defendant avers upon information and belief that after the making of the said Lease the then members of the Board of Directors of the Susquehanna Company were re-elected until their respective deaths or their resignations as directors; that it was found difficult to find persons to take the place of such directors deceasing or resigning, who were willing to attend regularly the meetings of the board of directors which were called from time to time, other than such persons as could be induced by this defendant to act as such directors, and that the individuals who thus were induced to become such directors were largely officers or directors of this defendant. This defendant upon information and belief says, however, that such new directors of the Susquehanna Company so nominated by this defendant for that purpose, did not constitute a majority of the board of directors of the Susquehanna Company before the year 1897. This defendant further says that it is not true that such of the members of the board of directors of the Susquehanna Company as were directors or officers of this defendant in fact controlled this defendant or its board of directors; and that it is not true that they represented as such directors of the Susquehanna Company the interests of this defendant in opposition to the interests of the Susquehanna Company, or were under any duty to this defend-

ant or to its stockholders to help this defendant and to protect its interest as against the Susquehanna Company or its stockholders; and this defendant avers upon the contrary that such directors and officers of this defendant, while acting as directors of the Susquehanna Company, always fully performed their said duties to the Susquehanna Company and its stockholders, never believing that their relations to this defendant required them to act unjustly towards the Susquehanna Company. This defendant never sought to influence them in their action as such directors.

109 This defendant admits that Robert Olyphant named in the bill of complaint was President and director of the Susquehanna Company at the time this suit was instituted, but denies that he is now either such president or director, and further denies that he was an agent or representative of this defendant or that his business was dependent upon this defendant or that he was represented on the board of directors of this defendant, although this defendant admits that said Robert Olyphant is the son of Robert M. Olyphant, one of the directors of this defendant and chairman of the executive committee of its board of directors. This defendant denies that William L. M. Phelps, who was and still is secretary of the Susquehanna Company and who was a member of its board of directors when this suit was instituted, was so employed by this defendant; and this defendant says that on the contrary the said Phelps was secretary of the Susquehanna Company before this defendant became lessee under the said Lease in February, 1870, and that he has continuously been and still is retained as such secretary by the successive boards of directors of the Susquehanna Company, and not by this defendant. This defendant also denies that either James H. Manning or Robert C. Pruyn, who were directors of the Susquehanna Company at the time this suit was instituted, was largely interested with this defendant or had intimate business relations therewith while such director.

This defendant further says that none of the individuals mentioned in the bill of complaint as being the directors of the Susquehanna Company, are now directors of the said Company.

This defendant admits that it owns about forty-five hundred shares of the capital stock of the Susquehanna Company. This defendant does not know how many shares of the said stock are owned by the directors of this defendant, but it denies that this defendant or that this defendant and its directors control a majority of the shares of the capital stock of the Susquehanna Company, or that this defendant or its directors have ever procured the stock held by them

110 or either of them to be voted in opposition to the interests of the Susquehanna Company, or that any of its directors have ever known or had any reason to know that this defendant was indebted to the Susquehanna Company, or that they conspired with this defendant to deprive the Susquehanna Company and its stockholders of any income to which they were entitled, for the benefit of this defendant or otherwise; and this defendant again denies that this defendant has ever been so indebted to the Susquehanna Company.

This defendant admits that it knew and approved of the issuing of the notice, circular and form of proxy referred to in the bill of complaint, copies of which are annexed thereto as Exhibits C, D and E, and that such documents were issued in consequence of a request to this defendant that the Susquehanna Company should make an issue of $10,000,000 at par of its new four per cent. preferred stock, upon an increase of such stock to be made for that purpose, such shares to be guaranteed by this defendant and the proceeds of the sale thereof applied to the redemption of the before mentioned issue of $10,000,000 Consolidated Bonds of the Susquehanna Company which were to mature on April 1, 1906, and that when a small minority of the shareholders of the Susquehanna Company objected to the issue of such preferred stock, this defendant, being at all times willing to respect the wishes of the security holders of the Susquehanna Company so far as it could consistently do so, withdrew its said request and accepted from the Susquehanna Company $10,000,000 of its forty year three and one-half per cent. mortgage gold bonds, the payment of the principal and interest of which was then guaranteed by this defendant and used in order to redeem the said outstanding $10,000,000 Consolidated Bonds of the Susquehanna Company, of which $3,000,000 bore seven per cent. interest and $7,000,000 six per cent. interest.

111 While this defendant avers and insists that the allegations of the said bill in respect to the said exhibits are absolutely immaterial and impertinent to any issue involved in this suit, and therefore need not be answered by this defendant, it nevertheless further answering says that when it made the said request it was advised and believed and still believes that the proposed issue of the said preferred stock would not have been inconsistent with the provisions of the said Lease and Supplemental Contract, and that it would have been greatly to the advantage of the Susquehanna Company and of all its stockholders if the said Consolidated Bonds had been redeemed by the issue of such preferred stock rather than through the issue of the new Mortgage Bonds of that Company which was actually made for that purpose; since the issue of such preferred stock would have funded forever at four per cent. the said $10,000,000 mortgage debt, and since the holders of such preferred stock could never have the right by the foreclosure of any lien to cut off and destroy the rights of the holders of the original stock of the Susquehanna Company, their sole pecuniary rights being to receive two per cent. semi-annual dividends upon the said shares of stock and to enforce the guarantee of this defendant of the payment of such dividends. This defendant denies that Exhibits C, D and E were issued collusively, as alleged in the bill, or that the statements therein were in any respect incorrect or misleading or that the said scheme was supported by the directors of the Susquehanna Company acting in collusion with this defendant or for its benefit, or that the said scheme was in any respect in violation of the rights of the complainants or other stockholders of the Susquehanna Company, or that the execution of the said scheme could have been enjoined by any or all of the stockholders of the Susquehanna Company.

This defendant upon information and belief denies that a demand by the complainants or any other stockholders of the Susquehanna Company made to the officers or directors of the Susquehanna Company before the institution of this suit, requesting that Company to take any action upon its part with reference to the matters and things alleged in the bill of complaint, would have been idle or nugatory; and avers upon information and belief that if any such demand had been made of the said officers or directors of the Susquehanna Company or of the stockholders of the said Company, such action would have been taken by the said Company in that behalf as should have been advised by disinterested counsel learned in the law and in no way connected with this defendant to be proper or expedient, and this defendant says that at a meeting of the stockholders of the Susquehanna Company held within four months after this suit was instituted, the promoters of this suit were elected directors of the said Company and now constitute a majority of such directors.

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Further answering, this defendant alleges upon information and belief that this suit has been brought as a part of a scheme devised by a combination of individuals, not including the complainants, acting as a so-called Protective Committee, whereby the owners of shares of the capital stock of the Susquehanna Company should be induced to deposit their certificates for such shares with a depositary subjets to the order of such committee and make a transfer of their shares to the said committee, subject to an agreement in writing authorizing the members of the said committee to institute one or more suits or actions, either in their own names or in that of one or more of such depositing stockholders, to compel this defendant to pay to the Susquehanna Company sums of money by way of further rental under its lease from the Susquehanna Company, and to compromise such suits or actions; it being a part of the agreement in that behalf that such depositing stockholders should not be liable for the expenses of any litigation so instituted beyond the amount of one per centum upon the par value of their shares, any expenses beyond such amount being necessarily borne by the members of the said committee; and it being also part of the said scheme that the members of the said committee should be allowed for their compensation and for fees to the counsel of the committee a certain percentage of the total amount of benefit derived by the depositing stockholders from the action of the committee and that in estimating this benefit any increased dividend rate upon the depositing shares consequent upon the proposed litigation should be capitalized upon a fixed interest basis. The aforesaid agreement contained further detailed provisions as to the respective rights of the depositing stockholders and the members of the said committee, and was distributed among the stockholders of the Susquehanna Company accompanied by certain other instruments referred to therein, of all of which instruments this defendant will ask to make proof on the trial of this suit. This defendant avers, upon information and belief, that the complainants herein have in fact, as contemplated by the terms of the said scheme, made an actual transfer of

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their shares of stock of the Susquehanna Company to the said committee, and are no longer the legal owners of such shares.

This defendant further says, upon information and belief, that the said Protective Committee caused the institution of this suit and, for the purpose of conferring jurisdiction of this suit upon this Court, intentionally selected as complainants in this suit only persons and corporations who were citizens of other States than the State of New York, and for the same purpose refrained from making any demand upon the Susquehanna Company or the stockholders thereof to take any action in respect to any of the matters alleged in the bill of complaint herein; and that this suit was collusively brought to confer jurisdiction upon the Circuit Court of the United States in respect to a matter of which it would not otherwise have cognizance, since any action brought by the Susquehanna Company itself against this defendant would necessarily have been brought in the Courts of the State of New York, both parties
114 being citizens of that State within the meaning of the statutes conferring jurisdiction upon United States Circuit Courts.

FOURTH. *To so much of said bill of complaint as claims or alleges that this defendant has failed to pay to the holders of the shares of stock of the Susquehanna Company any part of any dividends which this defendant was obligated to pay to such stockholders by reason of its direct guarantee of such dividends made to the said stockholders in pursuance of the said Lease and Supplemental Contract, this defendant further answering says:*

This defendant admits that it has endorsed upon all the certificates of stock issued by the Susquehanna Company a guaranty as follows: "The Delaware and Hudson Company hereby for value received "guarantees the payment of a semi-annual dividend of three and "one-half per cent. upon the stock represented by the within certifi- "cate, to be paid on the first days of January and July in each year, "until the Albany City Bonds which were loaned to the Albany and "Susquehanna Railroad Company to the amount of one million dol- "lars shall be paid by the operation of the sinking fund provided for "their payment, and thereafter the said Company guarantees to pay "upon said stock four and one-half per cent. semi-annually on the "same days, subject to the conditions and provisions of the Lease "made by said Railroad Company to said Company dated February "twenty-fourth, 1870, and of an agreement supplemental thereto "dated the seventh day of March, A. D. 1876."

This defendant admits that the City of Albany did loan to the Susquehanna Company under the provisions of an act of the Legislature of the State of New York, as set forth in the bill of complaint in that behalf, its six per cent. thirty year Bonds in the amount of $1,000,000, and that to secure the payment of the said Bonds and six per cent. interest thereon, as the same shall accrue, and also the payment to the Trustees of the Sinking Fund of the City of Albany of
115 one per centum annually upon the said bonds, and also the payment to the said Trustees of any premiums which should be received by the Susquehanna Company upon the sale of the said

City Bonds, the Susquehanna Company executed on or about November 1, 1865, a mortgage upon its railroad property and franchises to the Mayor, Aldermen and Commonalty of the City of Albany, to which mortgage this defendant craves leave to refer upon the trial of this action for evidence as to its terms. This defendant also admits that in and by the said mortgage the Susquehanna Company covenanted to pay also to the said Sinking Fund Trustees any moneys which it should derive from the sale of any portion of any of the mortgaged premises made with the consent of the mortgagees in the said mortgage.

This defendant upon information and belief says that no premiums were received by the Susquehanna Company upon the sale of the said Bonds, and that no portion of the mortgaged property was sold by the Susquehanna Company during the term of the said mortgage either with or without the consent of the said mortgagees.

This defendant denies that the amounts due and payable either by the Susquehanna Company or by this defendant to the said Sinking Fund of the City of Albany, if made, would have been sufficient to have paid the said Albany City Bonds before the year 1902. The said $1,000,000 thirty year six per cent. Albany City Bonds loaned to the Susquehanna Company bore dates as follows: $250,000, November 1, 1865; $250,000, May 1, 1866; $250,000, November 1, 1866, and $250,000, May 1, 1867, and were respectively issued to the Susquehanna Company on or about the said dates. These bonds therefore matured respectively on November 1, 1895; May 1, 1896; November 1, 1896, and May 1, 1897. The sinking fund installments during the term of the said Bonds would amount to only $300,000, but at the then prevailing rate of interest it had been calcu-
116 lated that the accumulated interest upon the said installments from the time of their respective payments would yield a fund sufficient to redeem the said bonds. The legal rate of interest in the State of New York having been reduced to six per centum in the year 1880, and the rate of interest upon such investments as could be made by the Trustees of the sinking fund having fallen even below the rate of six per centum, the sinking fund did not suffice to pay the whole issue of the said bonds as the same matured, although in fact the Susquehanna Company and this defendant at all times duly paid the said annual installments of $10,000 to the Trustees of the said sinking fund down to the time of the maturity of the said bonds. In fact the sinking fund sufficed only to pay the $250,000 of the said City Bonds maturing November 1, 1895, the $250,000 maturing May 1, 1896, and about $180,000 of the $250,000 maturing November 1, 1896. The remainder of the said bonds were paid by this defendant for the account of the Susquehanna Company when the said bonds matured respectively November 1, 1895, and May 1, 1896. Upon making such payments this defendant took the obligations of the Susquehanna Company for the amounts so paid, and thereafter applied the payments of $70,000 a year which theretofore had been applied to the payment of the interest and sinking fund contributions upon the said City Bonds, to the reduction of the said obligations of the Susquehanna Company and the payment of interest thereon;

with the result that the said obligations were not extinguished until some time in the year 1902, prior to the first day of July, 1902. On May 1, 1897, the amounts so advanced by this defendant for the Susquehanna Company amounted to $250,000, an amount which would not have been satisfied by the application thereto of $10,000 annually in continuation of the sinking fund contributions, until May 1, 1922. This defendant therefore avers and insists that the said Albany City Bonds have not as yet been paid "by the operation of the sink-

117 ing fund provided for their payment" within the meaning of the provisions of the said Supplemental Contract and of the guaranty made by this defendant to the stockholders of the Susquehanna Company; and that this defendant was not in January, 1903, legally bound to pay to the holders of the shares of stock of the Susquehanna Company any semi-annual dividends upon their stock in excess of three and one-half per centum. This defendant further says that before the year 1897 the Susquehanna Company had become largely indebted to this defendant by reason of the payment by this defendant to the State of New York of the amounts annually imposed upon the Susquehanna Company by way of franchise taxes, which taxes this defendant was not obligated itself to pay under the terms of the said Lease and Supplemental Contract, but was compelled to pay to maintain the quiet possession of the leased property which had been covenanted in the said Lease; and that this defendant therefore had the right after the year 1897 to withhold the further annual payment to the Susqushanna Company of the said amount of $70,000 before paid by it in respect to the said Albany City Bonds, or of so much of the same as should be needed from time to time to cover the amount of the said franchise taxes theretofore paid or thereafter annually imposed, and to continue to do this until the said Albany City Bonds had in fact been paid "by the operation of the sinking fund provided for their payment." This defendant also says that there are other items of indebtedness owing to it by the Susquehanna Company in addition to those already set forth, but that this defendant has not known of any means of collecting the same from the said Company.

This defendant however on January 1, 1903, nevertheless, began the payment of four and one-half per cent. dividends semi-annually to the holders of the shares of capital stock of the Susquehanna Company, although no legal right then existed in favor of the said stockholders to receive these increased dividends from this defendant, and has ever since continued such payments.

118 This defendant denies that upon the payment of the said $1,000,000 Albany City Bonds it failed to pay the amount designated for the service thereof or otherwise during its existence as in the said Lease provided, or that it retained the same or any part thereof for its own use.

This defendant, upon information and belief, denies that about the year 1881 or at any time the accounts and records of the Trustees of the aforesaid sinking fund were destroyed by fire or otherwise, or that since the said year the said Trustees have kept no complete accounts; and this defendant avers on the contrary that the

said accounts are still in existence, and that they were fully kept by the said Trustees and reported to the City of Albany until after the period when the said City Bonds were fully paid through moneys advanced for that purpose by this defendant.

This defendant also denies that any accounts showing the investments of the moneys paid by the Susquehanna Company or by this defendant to the said Sinking Fund Trustees, are or ever have been in the possession or under the control of this defendant; although this defendant does not deny that since the institution of this suit it has procured printed copies of the said reports of the said Sinking Fund Trustees.

This defendant denies that it now holds or ever held any trust relations with the complainants or with the Susquehanna Company in respect to the said sinking fund investments or its accounts, and avers that its only duty in the premises was to make the payment of the annual installments toward the said sinking fund to the proper officials of the City of Albany, and says that the said payments were all duly and promptly made.

This defendant further says that neither the complainants nor any other stockholder of the Susquehanna Company has ever applied to this defendant for any statement or any account of the time when or the manner in which, the said Albany City Bonds had been paid or whether they had in fact been paid by the
119 operation of the sinking fund provided for their payment; and that upon any request made in that behalf this defendant would have furnished any such applicant with a full statement of the facts. This defendant further says that prior to the institution of this suit no intimation was given to this defendant by or on behalf of the plaintiffs or any other stockholder of the Susquehanna Company, or by the so-called Protective Committee before in this answer referred to, or by the attorneys of that Committee, some or all of whom are the attorneys for the plaintiffs herein, that any claim was supposed to exist in favor of the stockholders of the Susquehanna Company by reason of the matters alleged in the bill of complaint; and that the filing of the bill of complaint herein was the first intimation received by this defendant that anyone supposed any such claim existed.

This defendant avers and insists therefore that it is under no duty to account to the plaintiffs or to the Susquehanna Company in respect to the said sinking fund or its investments.

This defendant also insists and avers that if the complainants or any other stockholders of the Susquehanna Company have any right to receive from this defendant any further payment of moneys as dividends upon their respective shares of stock, under the guaranty or guaranties of this defendant endorsed upon the certificates for such shares respectively, then a perfect and adequate remedy at law exists in that behalf, to which they have not resorted and which has not been exhausted; and that they therefore have no standing in a Court of Equity to maintain this suit in that behalf against this defendant.

And this defendant denies all and all manner of unlawful com-

bination and confederacy wherewith it is by the said bill charged, without this, that *there is* any other matter, cause or thing in the said plaintiffs' said bill of complaint contained material or necessary for this defendant to make answer unto, and not herein or
120 hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain and prove, as this Honorable Court shall direct, and humbly prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

THE DELAWARE & HUDSON COMPANY,
By OPDYKE, LADD & BRISTOW,
[SEAL.] *Its Solicitors.*

LEWIS E. CARR,
WM. S. OPDYKE,
Of Counsel.

UNITED STATES OF AMERICA,
Southern District of New York,
City, County, and State of New York, ss:

Charles A. Walker, being duly sworn, doth depose and say: I am the Treasurer of The Delaware and Hudson Company, the above named defendant, and as such am authorized to make this affidavit for and on behalf of said corporation. So much of the foregoing answer as concerns the acts and deeds of the said defendant is true to the best of my knowledge, and so much thereof as concerns the acts and deeds of any other person or persons, I believe to be true.

CHARLES A. WALKER.

Sworn to before me this 28th day of November, 1906.

THOS. J. CURRAN,
[SEAL.] *Notary Public* (132), *New York County.*

(Endorsed:) U. S. Circuit Court. Filed Nov. 28, 1906. Southern District, New York. John A. Shields, Clerk.

121 *Replication.*

United States Circuit Court, Southern District of New York.

AETNA INSURANCE COMPANY ET AL., Complainants,
against
ALBANY & SUSQUEHANNA RAILROAD COMPANY and DELAWARE & HUDSON COMPANY, Defendants.

The Replication of the Complainants Above Named to the Answers of Albany & Susquehanna Railroad Company and Delaware & Hudson Company, Defendants.

Now come the complainants in this suit, by Howland, Murray & Prentice, their solicitors, and saving and reserving to themselves all,

and all manner of advantage of exception to the manifold insufficiencies of the said answers, for replication thereunto saith, that they will aver and prove their said bill to be true, certain and sufficient in the law to be answered unto; and that the said answers of the said defendants are uncertain, untrue and insufficient to be replied unto by these complainants; without this, that, any other matter or thing whatsoever in the said answers contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things these complainants are, and will be, ready to aver and prove, as this honorable Court shall direct; and humbly pray, as in and by their said bill they have already prayed.

HOWLAND, MURRAY & PRENTICE,
Their Solicitors.

(Endorsed:) U. S. Circuit Court. Filed Dec. 7, 1906. Southern District, New York. John A. Shields, Clerk.

122 EXHIBIT "B."

Demurrer.

United States Circuit Court, Southern District of New York. In Equity.

ÆTNA INSURANCE COMPANY ET AL., Complainants,
against
ALBANY AND SUSQUEHANNA RAILROAD COMPANY and DELAWARE AND HUDSON COMPANY, Defendants.

Demurrer of the above-named Defendant, Albany and Susquehanna Railroad Company, to the Bill of Complaint of the above-named Complainants.

This defendant demurs to the said bill of complaint and for causes of demurrer shows:

1. That it appears by the complainants' own showing by the said bill that they are not and that none of them is entitled to the relief prayed for by the bill against this defendant.

2. That said bill of complaint fails to set forth that any effort has ever been made by the complainants or any of them to secure any action concerning the matters and things set up in said bill on the part of the directors or stockholders of this defendant, and that said bill of complaint fails to set forth any reason or excuse for
123 the entire failure of the complainants and each of them to make any effort to secure action in the premises on the part of the directors or stockholders of the defendant.

3. So far as said bill of complaint seeks an accounting with respect to the time when the Albany City bonds referred to in said bill were paid by the operation of the sinking fund in that behalf provided, the said bill wholly fails to show that the complainants or

any of them ever sought any information on this subject from this defendant or any of its officers or agents or directors, or ever sought permission of this defendant, its officers, agents or directors, to examine the books of this defendant relating to such accounts.

Wherefore, and for divers other good causes of demurrer appearing on the said bill of complaint, this defendant demurs thereto and prays the judgment of this Honorable Court whether it shall be compelled to make any answer to said bill, and prays to be hence dismissed with its reasonable costs in this behalf sustained.

ALBANY AND SUSQUEHANNA
RAILROAD COMPANY,
By ROBERT OLYPHANT, *President.*

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

WALKER D. HINES,
Counsel for Defendant Albany and
Susquehanna Railroad Company.

124 UNITED STATES OF AMERICA,
Southern District of New York, ss:

Robert Olyphant, being duly sworn, deposes and says: That he is the president of the above-named defendant, Albany and Susquehanna Railroad Company, and that the foregoing demurrer is not interposed for delay.

ROBERT OLYPHANT.

Sworn to before me this 28th day of September, 1906.

[SEAL.] FLORENCE M. EPWORTH,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

(Endorsed:) In Equity.—United States Circuit Court, Southern District of New York.—Ætna Insurance Company *et al.*, Complainants, against Albany and Susquehanna Railroad Company and Delaware & Hudson Company, defendants.—Demurrer.—Walker D. Hines, Atty. for Defendant, Albany and Susquehanna Co., 52 William St., Borough of Manhattan, New York, N. Y.—U. S. Circuit Court.—Filed Sept. 29, 1906.—John A. Shields, Clerk.

125 United States Circuit Court, Southern District of New York.

ÆTNA INSURANCE COMPANY ET AL., Complainants,
against
ALBANY AND SUSQUEHANNA RAILROAD COMPANY and DELAWARE AND HUDSON COMPANY, Defendants.

SIRS: Please take notice that the demurrer heretofore interposed on behalf of the defendant Albany and Susquehanna Railroad Com-

pany and filed in the office of the Clerk of this Court on the 29th day of September, 1906, is hereby withdrawn.

Dated New York, November 2, 1906.

HERBERT S. BARNES,
Solicitor for Defendant Albany & Susquehana Railroad Company, 35 Wall Street, New York.

To Messrs. Howland, Murray & Prentice, Solicitors for Complainants, 35 Wall Street, New York City.

(Endorsed:) United States Circuit Court, Southern District of New York.—Etna Insurance Company *et al.*, Complainants, against Albany & Susquehanna Railroad Company and Delaware & Hudson Company, Defendants. Copy. Notice of withdrawal of demurrer. Herbert S. Barnes, Solicitor for defendant, Albany & Susquehanna R. R. Co., 35 Wall Street, Borough of Manhattan, New York City. To Howland, Murray & Prentice, Solicitors for complainants. Due and timely service of a copy of the within notice is hereby admitted. Dated November 2, 1906. Howland, Murray & Prentice, Solicitors for complainants. U. S. Circuit Court Southern District of New York. Filed Nov. 3, 1906. John A. Shields, Clerk.

126 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Aetna Insurance Company and others, Compl'ts-Appellees, *vs.* Albany & Susquehanna R. R., Def't-Appellee, and The D. & H. Co., Defendant-Appellant. Certification of questions. United States Circuit Court of Appeals, Second Circuit. Filed May 22, 1908. William Parkin, Clerk.

Endorsed on cover: File No. 21,199. U. S. circuit court appeals, 2d circuit. Term No. 416. The Delaware & Hudson Company *vs.* The Albany & Susquehanna Railroad Company *et al.* (Certificate.) Filed May 29th, 1908. File No. 21,199.